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No. _____

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In The

Supreme Court of the United States

October Term, 1993

GEORGE VOSE, DIRECTOR, DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

THOMAS P. BOWLING,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FIRST CIRCUIT IMPROPERLY DISREGARDED FINDINGS OF HISTORICAL FACT MADE BY THE STATE COURTS.

II. WHETHER THE CIRCUIT COURT'S APPLICATION OF THIS COURT'S HOLDING IN *TAYLOR V. ILLINOIS* TO THIS CASE WAS ERRONEOUS.

III. WHETHER THE FIRST CIRCUIT'S DECISION SHOWED AN IMPROPER DISREGARD FOR STATE RULES OF CRIMINAL PROCEDURE.

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Now comes George Vose, Director, Rhode Island Department of Corrections, [hereinafter referred to as the State] by his attorney, and prays that this Honorable Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit entered on September 10, 1993.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported as *Bowling v. Vose*, 3 F.3d 559 (1st Cir. 1993), and is reproduced as Appendix A.[1] The opinion of the District Court for the District of Rhode Island is reported as *Bowling v. Vose*, Civ. No. 91-0472, slip op. (D.R.I. Nov. 13, 1992) and is reproduced as Appendix D. The opinion of the Supreme Court of Rhode Island is reported as *State v. Thomas P. Bowling*, 585 A.2d 1181 (R.I. 1992) and is reproduced as Appendix E.

[1] After the State filed a petition for rehearing which asserted that the First Circuit had exceeded its jurisdiction and engaged in impermissible factfinding, that court, by way of an Errata Sheet, amended its opinion with three footnotes: 3 F.3d at 560, n.2; 3 F.3d at 561, n.4; and 3 F.3d at 562, n.6. In the first footnote, the court disputed the State's and the Rhode Island Supreme Court's interpretation of the testimony of one key witness; the second footnote acknowledges that the court conducted its own analysis de novo under *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988), which resulted in its disagreement with the state supreme court; and the final footnote asserts that no finding of willful misconduct was made below.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the First Circuit remanding this case to the United States District Court for the District of Rhode Island for further proceedings were entered on September 10, 1993. The State's Petition for Rehearing was denied on October 20, 1993, and is reproduced as Appendix B. The State's timely Motion to Stay Mandate pending this Petition for Certiorari was granted until November 26, 1993, and that order is reproduced as Appendix C. Jurisdiction is invoked under 28 U.S.C. §§ 1254, 1257 and 2254 and Sup. Ct. R. 10(a) and 10(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Also involved is a Rhode Island Superior Court Rule of Criminal Procedure which governs the discovery process at the trial level. The pertinent portions of Super. Ct. R. Crim. P. 16 are set forth below; the entire text of the rule is reproduced as Appendix F.

> (c) Notice of Alibi. In the event a defendant seeks any discovery under subdivision (a) of this rule, then upon demand by the attorney for the State and delivery by him or her to the defendant of a written statement describing with specificity the date and time when and the place where the offense charged is alleged to have occurred, the defendant, within twenty one (21) days after receipt of such demand and particulars, shall give written notification whether he or she intends to rely in any way on the defense of alibi. If the defendant does so intend, the notice shall state with specificity the place at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses the defendant intends to call at the trial to establish such alibi. Within twenty-one (21) days after receipt of written notification of intent to rely on the defense of alibi, together with particulars thereof, the attorney for the State shall furnish to the defendant written notice of the names and addresses of the witnesses whom the State intends to call at the trial to establish defendant's presence at the place where and the time when the offense is alleged to have occurred.
>
> * * *
>
> (i) Failure to Comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to

provide the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material which or testimony of a witness whose identity or statement were not disclosed, or it may enter such other order as it deems appropriate.

STATEMENT OF THE CASE

The defendant/respondent Thomas Bowling, [hereinafter referred to as the defendant] was convicted of first-degree arson following a jury trial in Providence County Superior Court in September, 1988. The trial justice subsequently sentenced defendant to twenty-five years imprisonment of which ten years was suspended. Bowling's appeal of that conviction was denied and dismissed by the Rhode Island Supreme Court, which held that the exclusion of an alibi witness offered by the defense at trial did not violate defendant's right to present witnesses in his behalf under the Compulsory Process Clause of the Sixth Amendment, as defendant had failed to disclose such evidence to the prosecution as is required by state rules of criminal procedure. R.I. Super. Ct. R. Crim. P. 16. The Rhode Island court noted that the Compulsory Process Clause does not allow a defendant the privilege of offering testimony free from the requirements of the adversarial system. *State v. Bowling*, 585 A.2d 1181, 1185 (R.I. 1991). Bowling petitioned this Court for certiorari. Certiorari was denied on June 10, 1991. *Bowling v. Rhode Island, cert. denied,* ___ U.S. ___, 111 S.Ct. 2810 (1991) (see Appendix). The defendant thereafter brought a petition for habeas corpus in the United States District

Court for the District of Rhode Island. The Department of the Attorney General of the State of Rhode Island [hereinafter referred to as the State] was designated party/respondent. On February 20, 1992, a hearing was held before Chief Judge Francis J. Boyle, who issued a decision on November 13, 1992 denying the petition. Judge Boyle's decision found that the trial justice had acted properly in excluding the proposed evidence as a sanction for defendant's failure to disclose the witness. Noting that this case "fits neatly into the requirements of *Taylor v. Illinois*," 484 U.S. 400, 108 S.Ct. 646 (1988), the District Court held that in light of the trial justice's finding that the defendant "seized upon [the alibi] tactic" only after the State had rested, the court's imposition of the exclusionary sanction was a permissible exercise of its duty to ensure the "fair and efficient administration of justice." *Bowling v. Vose*, Civ. No. 91-0472, slip op. (D.R.I. Nov. 13. 1992), Appendix D at 4-5.

The defendant's appeal of that ruling to the United States Court of Appeals for the First Circuit followed. Ignoring the factual findings made by the Rhode Island Superior [trial level] Court and the Rhode Island Supreme Court, the First Circuit determined that there was no willful misconduct on the part of the defense, thus rendering imposition of the exclusionary sanction inappropriate and a deprivation of defendant's fundamental rights under the Sixth Amendment. After making this finding, the First Circuit remanded the case to the United States District Court of Rhode Island for a determination as to whether or not the error was sufficiently harmful to warrant habeas relief.

STATEMENT OF FACTS

The facts set forth in the Rhode Island Supreme Court's opinion in *State v. Bowling*, 585 A.2d 1181, 1182-3 (R.I. 1991), relate the events of June 7, 1986 which gave rise to the instant petition. On that evening, Peter Brown, a resident of Pawtucket, Rhode Island, awoke to the sound of firefighters at a neighboring three-story apartment building located at 502 Pawtucket Avenue in that city. Brown learned that a small fire in a dumpster there had already been extinguished. He recognized a tenant of the building, Thomas Bowling, standing with the firefighters. As he returned to his own residence, Brown again noticed Bowling, this time driving his car down Pawtucket Avenue. He saw the defendant turn the car around and park it in front of the building. After a short time, Brown went back outside to walk his dog. Walking past 502 Pawtucket Avenue, he noticed smoke coming from the side entrance. He saw Bowling run into the building and emerge ten to fifteen seconds later, coughing and choking.

Pawtucket firefighter Ronald Doire, who testified at defendant's trial, was among the fire personnel responding to the scene. Doire testified that when he entered a side door of the building, he encountered the defendant, overcome by smoke.

Investigators from the Rhode Island State Fire Marshall's Office were called in. Inspector Donald Byrne arrived at 1:00 a.m. He testified that his observations of the fire's pattern of travel, along with the depth of charring at various points, led him to conclude that it began in the staircase area leading down to the basement, and

that it had burned for one-half to three-quarters of an hour before it was discovered at about 11:46 p.m. Inspector Byrne also testified that the fire was incendiary in nature, and not of accidental origin.

Thomas Miguel, another resident of the building, was the son-in-law of Doris Palmieri, Bowling's common-law wife. Miguel testified that as he was preparing to go out that evening, he heard his fourteen-year-old daughter, Tammy, screaming from the hallway. When he went outside to investigate, he saw the defendant holding a flaming bag. When he asked him what he was doing, Bowling responded, "I'll pay the son of a bitches back, raising my rent * * * ." When Miguel told Bowling he intended to take his daughter out of the house, the defendant responded that "the best thing you can do is take your family out of here."

Several days after the fire, Tammy Miguel gave a statement to police indicating that she had seen defendant, whom she regarded as her grandfather, attempt to throw some lighted paper into a vent leading into the first floor of the building. Ms. Miguel also reported that Bowling had told her he was going to set the house on fire because the landlord had raised his rent. At trial, she told a different story, claiming she had lied when she made those earlier statements. Mildred and Gerald Coutu, the owners of the premises, testified at the defendant's trial. According to Mrs. Coutu, she received a telephone call about ten minutes to eight on the evening of the fire. Although the caller was slurring his words, she recognized the voice as belonging to one of her tenants, Thomas Bowling. Bowling complained about the price of his rent, and asked that it be lowered. When Mrs.

Coutu suggested that if he was unhappy he was free to move, he threatened to sue her. The day after the fire, Mr. and Mrs. Coutu went to the property to survey the damage and remove debris from an adjacent sidewalk. At this time, Tom Miguel drove up with his daughter. According to Mrs. Coutu. Tammy Miguel said to them, "[Bowling] did it, didn't he? * * * He said he was going to do this, set the house on fire." Mr. Coutu also testified that Thomas Miguel told the defendant that he "could get twenty years" for setting the fire.

As it is required to do by the provisions of Super. Ct. R. Crim. P. 16, the State filed an information package in compliance with Bowling's pre-trial request for discovery. Included was a statement given to police by Doris Palmieri, Bowling's common-law wife, the day after the fire. *See* Appendix G. Ms. Palmieri told police that sometime after 10:00 p.m. on the night of June 7, 1986, her boyfriend "Tex" Bowling picked her up, along with her sister and a girlfriend, at a club in Providence, after which they drove back to their apartment on Pawtucket Avenue. After they went inside, according to Ms. Palmieri, the defendant told her she should not sleep in the apartment, but should leave. A short time later, she discovered the building was on fire. Ms. Palmieri died of causes unrelated to the fire in 1986. The State also provided defense counsel with a copy of the report of the Division of Fire Safety, which lists the time of the fire as 11:34 p.m. *See* Appendix H.

The State served its own request for discovery and alibi upon the defendant on November 26, 1986, in accordance with state rules of criminal procedure. *See* Appendix I. Pursuant to R.I. Super. Ct. R. Crim. P. 16(c), the

State's alibi request specified 2300-2400 hours (11:00 p.m. – 12:00 a.m.) as the time of the offense charged. No response was made by defendant until September 26, 1988, after the State had rested its case against him. *See* Appendix J. At that time, counsel furnished the State with a statement that the defense intended to call one Jeannette Fagundes to the stand. The defense proffered that Ms. Fagundes would testify that the defendant lived with her sister, Doris Palmieri, for many years and that she often visited the couple at their Pawtucket Avenue apartment. According to the statement, Ms. Fagundes would tell the court that on the night of June 7, 1986, she and her sister were at the Lithuanian Club on Smith Street in Providence, along with another friend, who was also deceased at the time of trial, and that sometime after 10:00 p.m., they were picked up there by Bowling, who then drove her [Fagundes] and the friend to Ms. Fagundes's house at 965 Chalkstone Avenue in Providence.

After the State presented its last witness on a Friday afternoon, defense counsel told the court that he did not know whether he would be putting on any evidence. On the morning of Monday, September 26th, he gave the State a copy of defendant's answer to request for discovery, including a summary of the proposed Fagundes testimony. Counsel told the court that he never intended to call Bowling to the stand. He acknowledged that he was aware of defendant's claim to have picked up Ms. Palmieri at the Providence club; the basis of his argument that he should be allowed to call Fagundes to the stand at the eleventh hour was that he was never aware of the significance of her proposed testimony until Inspector

Byrne testified. Counsel noted that the defendant was seen at the building at 11:30 p.m., just before the fire was reported. He asserted that Inspector Byrne's trial testimony, however, brought out that the fire had started approximately one-half hour before the report came in, thus making defendant's whereabouts at that time extremely significant. Thus, the proposed testimony of Ms. Fagundes was, according to defense counsel, in the nature of exculpatory evidence, and Pawtucket police had acted negligently in failing to procure this information during their investigation of the fire. While counsel admitted that he had been in possession of Doris Palmieri's statement referring to her sister, he said that he did not learn Ms. Fagundes's name until after the State rested its case, at which time the defendant told counsel where Ms. Fagundes was employed. Counsel spoke with the proposed witness that same afternoon. The defendant would be deprived of his right to a fair trial, asserted counsel, if this evidence so crucial to his defense was not admitted.

The prosecutor objected to the calling of Ms. Fagundes on grounds that the defense had failed to inform the State that it intended to rely upon an alibi in compliance with the provisions of R.I. Super. Ct. R. Crim. P. 16(c). Defense counsel had been provided with the statement of Doris Palmieri, and while counsel himself might not have known the identity of Ms. Fagundes, the defendant himself most certainly did. Such testimony, according to the prosecutor, would leave "a gaping hole" in the State's case. The prosecutor stated that she did not believe such information to be in any way exculpatory, but said that she would not object to Ms. Fagundes's

taking the stand if the Palmieri statement was also admitted.

After a recess, the court issued its decision on the matter. The trial justice concluded that the defendant had never intended to rely on an alibi defense, but adopted that tactic only after hearing the State's evidence. He noted that the defense had been in possession of the Palmieri statement since it was disclosed by the State in November, 1986. If the defendant had any intention of relying on an alibi defense, he had the obligation of so informing the State, regardless of whether or not he was aware of the identity and whereabouts of the witness. Acknowledging the fact that R.I. Super. Ct. R. Crim. P. 16 mandates full disclosure on the part of the State, the trial justice emphasized the reciprocal nature of the rule. After a defendant has taken advantage of the benefits the rule accords him, the State likewise has the right to obtain information necessary to the preparation of its case, including any alibi defense upon which defendant might rely, within stipulated time limits.

The trial justice acknowledged that Doris Palmieri's statement was prejudicial to the defendant, and said that were he to allow Jeannette Fagundes to take the stand, he would also allow the admission of the Palmieri statement in rebuttal. The fact that the State had rested its case, however, was the paramount consideration in the court's decision not to exercise that option, nor to grant a continuance to allow the State to prepare to rebut Ms. Fagundes's testimony. The court noted that it was responsible for ensuring "the orderly administration of justice." Citing in reliance the cases of *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988) and *State v. Engram*, 479 A.2d 716

(R.I. 1984), the trial justice determined that the only reasonable sanction to be imposed was the exclusion of the evidence.

The Rhode Island Supreme Court upheld the trial justice's actions in denying Bowling's direct appeal. Applying its own *Taylor* analysis, that court concluded that in light of the trial court's finding that "Bowling seized upon the alibi defense after having heard the state's entire case," the sanction of preclusion was an appropriate one. *State v. Bowling*, 585 A.2d at 1185. In remarking upon defendant's violation of the Rhode Island Superior Court Rules of Criminal Procedure, the court was impressed by the fact that even if the significance of the Palmieri statement was not apparent until Inspector Byrnes testified, the defense still waited five days before informing the prosecutor of its desire to present alibi evidence. *State v. Bowling*, 585 A.2d at 1184.

At the evidentiary hearing before Judge Boyle on Bowling's habeas petition, his trial counsel, Assistant Public Defender Dale Anderson, took the stand. Mr. Anderson admitted that prior to the trial, he was in possession of the Fire Marshall's report and the Palmieri statement. The Fire Marshall's report listed the time of the fire as 11:34 p.m. Mr. Anderson said that he had not intended to present alibi evidence, as he had relied upon the time contained in the Report of the Division of Fire Safety. Thus, he explained to the court, he did not grasp the significance of the Palmieri statement until some time after he heard Inspector Byrne's testimony that the fire started thirty to forty-five minutes before it was reported, which, according to his reasoning, could have placed the start of the fire at an earlier time – between 10:49 and

11:04 p.m. Mr. Anderson acknowledged that in preparation for trial, he never asked his client about the sister mentioned by Ms. Palmieri in her statement. In the course of discussion with his client after the State had rested its case on Friday morning, he learned that Bowling in fact knew Ms. Palmieri's sister and where she worked.

As did the Rhode Island Supreme Court in its opinion upholding the trial court's action, Chief Judge Boyle of the United States District Court also based his decision to deny Bowling's petition on the *Taylor* principle, which permits the exclusion of evidence as a discovery sanction. In so doing, Judge Boyle acknowledged that *Taylor* mandates that before deciding to exclude evidence, a trial court must weigh a defendant's right to compulsory process against countervailing public interests: (1) the integrity of the adversarial process, (2) the interest in the fair and efficient administration of justice, and (3) the potential prejudice to the truth-determining function of the trial process. The judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery request, whether or not the violation was willful and motivated by a desire to gain a tactical advantage, and the relative simplicity of compliance. *Bowling v. Vose,* Civ. No. 91-0472, slip op., Appendix D at 16-7, (quoting *Taylor,* 484 U.S. at 414-5, 108 S.Ct. at 655-6).

The District Court found that the trial justice had conducted the requisite balancing test set forth in *Taylor*: he had based his refusal to grant a continuance not only on the fact that the defendant had not complied with the rules of criminal procedure, but also on the fact that the State had already rested its case, and would have been

required substantially to alter its theory of the case in rebuttal.

In concluding that "This case fits neatly into the requirements of *Taylor v. Illinois*," Judge Boyle's opinion noted that:

> The tactic employed by defense counsel certainly questioned the integrity of the judicial process and the rejection of the witness was prompted by the Court's interest to see the fair and efficient administration of justice. Likewise the tactic employed was prejudicial to the truth-determining function of the trial. *Bowling v. Vose*, Civ. No. 91-0472, slip op., Appendix D at 18.

Upon appeal of that decision to the Court of Appeals, unlike the District Court, the First Circuit accorded no deference to the findings of historical fact made in state court. Rather, it embarked upon its own review of the facts, an improper exercise of its jurisdiction as a court of review, which in turn led to an erroneous application of existing caselaw.

ARGUMENT

I. THE FIRST CIRCUIT IMPROPERLY DISREGARDED FINDINGS OF HISTORICAL FACT MADE BY THE STATE COURTS.

It is well-settled that a state court's determination on the merits of a factual issue is entitled to a presumption of correctness on federal habeas review. Such determinations may not be overturned unless they are not fairly supported by the record. 28 U.S.C. § 2254(d); *Demosthenes*

v. Baal, 495 U.S. 731, 735, 110 S.Ct. 2223, 2225 (1990) (per curiam); *Burden v. Zant*, 498 U.S. 433, 436-7, 111 S.Ct. 862, 864 (1991) (per curiam).

The State of Rhode Island respectfully submits that the First Circuit Court of Appeals exceeded its jurisdiction in this case when it disregarded the findings of fact made by the trial and supreme courts of Rhode Island.

In its opinion, authored by Torruella, J., the Court of Appeals concluded that defendant could not have anticipated the relevance of the proffered alibi testimony without having first heard the testimony of Inspector Byrne. This finding is premised on the conclusion that the inspector's testimony shifted the time of the start of the fire, imparting significance to a ten-minute time period [10:49 – 10:59 p.m.] not encompassed in the State's alibi request. *Bowling v. Vose*, 3 F.3d 559, 560 (1st Cir. 1993).

The State respectfully suggests that this conclusion is flawed. As the Rhode Island Supreme Court noted in its opinion, it must be remembered that Inspector Byrne testified to his respective impressions that the fire had burned for thirty to forty-five minutes prior to its discovery *and* that it began at 11:46 p.m. Thus, Inspector Byrne's testimony actually implied that the fire began sometime *between 11:01 and 11:16 p.m.*, a time period included within the State's alibi request.

In its decision, the First Circuit notes the inspector's belief that the fire did not begin until 11:46 p.m., but qualifies this by stating that the Pawtucket Fire Department recorded the time of the fire as 11:34 p.m.; this latter time termed by the Circuit Court as "the most definitive evidence of the actual starting time." *Bowling v. Vose*, 3

F.3d 559, 560, n.2. This mischaracterizes the testimony by taking it out of the context in which it was related. While it may be true that the starting time of the fire as reported by the Pawtucket Fire Department is the more definitive time, it did *not* form the basis for the inspector's belief as to when the fire began. His conclusion that the fire began in the half-hour to forty-five minute period before its discovery was deduced from his belief as to when the fire was reported, which was, in his mind, 11:46 p.m. As the Rhode Island Supreme Court recognized, it is clear that the inspector's testimony, when viewed in its proper context, did not place the starting time of the fire outside the time frame specified by the alibi request. *State v. Bowling*, 585 A.2d at 1184. Thus, the First Circuit Court erred in finding that the ten-minute time period before eleven o'clock attained sudden relevance to Bowling's defense in the middle of trial. He was asked to provide an alibi for the hour between 11:00 p.m. and 12:00 a.m. Never, at any point during his trial, was he confronted with evidence which exceeded that time frame.

The First Circuit's misinterpretation of this evidence leads to the flawed conclusion that defendant was unfairly surprised during the course of his trial. Adherence to this finding requires further disregard of factual findings made at the state level. The Court of Appeals inexplicably concludes that "the trial court not only failed to make any explicit finding of willful misconduct, it seemingly concluded to the contrary." 3 F.3d at 562 n.6. Operating from this faulty presumption, the court reaches the consequently flawed conclusion that imposition of the exclusionary sanction was unwarranted in this case

because "no willful misconduct prevented timely disclosure of the alibi" and the failure of defense counsel to uncover such testimony was "negligence at worst." In so doing, the First Circuit virtually ignores the findings of the state trial and supreme courts that defendant "seized upon this [alibi] having heard the state's entire case and [after] the state had rested." *State v. Bowling*, 585 A.2d at 1184, and "employed a last minute switch in tactics" during the course of his trial. *State v. Bowling*, 585 A.2d at 1185. The Rhode Island Supreme Court, having made underlying findings of fact, determined that the failure to disclose the alibi testimony was inexcusable and that any resultant prejudice to Bowling "was largely self-inflicted." *State v. Bowling*, 585 A.2d at 1184. Such language certainly demonstrates that the state's high court did not believe petitioner had operated with honest, albeit mistaken, motives. The state court's findings of fact were clearly established and the First Circuit was bound to follow them, as the District Court did. The failure to do so renders the judgment erroneous.

II. THE CIRCUIT COURT'S APPLICATION OF THIS COURT'S REASONING IN *TAYLOR v. ILLINOIS* TO THIS CASE WAS ERRONEOUS.

A fundamental element of due process involves a defendant's right to produce his own witnesses in order to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967). Criminal defendants have a right to governmental assistance in compelling the attendance of favorable witnesses at trial and to put before the jurors evidence which might influence their determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct.

989 (1987). However, the Compulsory Process Clause of the Sixth Amendment "does not confer the right to present testimony free from the legitimate demands of the adversarial system." *United States v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160, 2171 (1975). In 1970, this Court held that a defendant's due process rights were not violated by a Florida procedural rule requiring that notice of alibi be provided to the state when said rules also provided for liberal discovery rights on behalf of the defendant. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893 (1970). In so doing, this Court recognized the legitimacy of the State's interest "in protecting itself against an eleventh-hour defense." 399 U.S. at 81, 90 S.Ct. at 1896. Significantly, the notice-of-alibi statute upheld in *Williams* provided for the exclusion of alibi witnesses as a sanction to be imposed in the court's discretion when a defendant fails to give the state notice of such witnesses.

In *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988), this Court addressed the question of whether the Sixth Amendment Compulsory Process Clause was violated by the preclusion of the testimony of a proposed defense witness when that witness was not identified in response to pretrial discovery requests made by the prosecution. While acknowledging that the clause confers the fundamental right on a defendant to present witnesses in his own defense, this Court held that it does not create an absolute bar to the preclusion of a defense witness as a sanction for violation of a discovery rule. 484 U.S. at 410, 108 S.Ct. at 653-4.

In *Taylor*, counsel moved to amend his discovery answer to include two witnesses, including one Mr.

Wormley, after presentation of testimony by the prosecution. Counsel told the court that these two witnesses had likely seen the incident leading to defendant's arrest for attempted murder. He said that the defendant had told him about Wormley earlier, but that he had been unable to locate him. The court responded that the names of the missing witnesses could have been provided even if their addresses were unknown. Nonetheless, defense counsel was permitted to make an offer of proof outside of the presence of the jury. In the voir dire examination, Wormley testified in a way which differed considerably from the proffer offered by counsel. He admitted that he had not seen the incident, and that in fact, he had not met defendant until two years after the incident occurred. The trial judge subsequently refused to allow Wormley to testify because the discovery rules had been violated, and also because the veracity of the witness was doubtful. In upholding the imposition of this sanction, this Court emphasized that compliance with rules of criminal procedure is the obligation of the defense as well as the prosecution, stating that:

> The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony. Neither may insist on the right to interrupt the opposing

> party's case and obviously there is no absolute right to interrupt the deliberations of the jury to present newly discovered evidence. The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence. 484 U.S. at 410-11, 108 S.Ct. at 654.

In the present case, the First Circuit has concluded that since the application of the *Taylor* principle by the state courts involved a question of law, that it is obliged to rule on the issue de novo. 3 F.3d at 561 n.4. The court proceeds to conclude that its own analysis of the facts under *Taylor* compels the opposite conclusion reached by the courts.

Once again, the First Circuit has employed faulty reasoning; in order to reach the conclusion it did, the court was obliged to reconsider not only the state courts' legal application of *Taylor* to the facts of the case, but to engage in a transformation of those facts as they were found below. This is not permissible.

In *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445 (1985), this Court considered the appeal of denial of habeas relief based upon the alleged coercion of a confession underlying the petitioner's conviction for murder. On direct appeal, the New Jersey Supreme Court held that an examination of the totality of the circumstances surrounding the confession had revealed that it had been properly admitted into evidence. In reversing the Court of Appeals' affirmance of the denial of habeas corpus, this Court reiterated that the admissibility of a confession

was a mixed question of law and fact subject to review at the federal level. The opinion at the same time stresses that state court findings on such matters of historical fact as the length of the interrogation and the defendant's familiarity with *Miranda*[2] warnings are binding in federal habeas corpus proceedings.

The Rhode Island Supreme Court's analysis of *Taylor* was based upon the trial justice's finding that defendant had "seized upon the alibi defense after having heard the state's case." *State v. Bowling*, 585 A.2d at 1185. Citing this Court's language in *Taylor* that "it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony" in those cases where a witness remained undisclosed as the result of a willful motivation to obtain a tactical advantage, *Taylor*, 484 U.S. at 415, the state court concluded that the Sixth Amendment was not violated at Mr. Bowling's trial. The Rhode Island court based its decision on several factors. In the first place, the statement of defendant's common-law wife, which made reference to the proposed witness, was made available by the State almost two years before trial. Despite the fact that defense counsel had no knowledge of the witness, Bowling did; it was he who told counsel where she could be located in the middle of trial. *State v. Bowling*, 585 A.2d at 1184.

Moreover, as previously discussed, defendant's compliance with discovery rules was not pendent upon the testimony of the fire inspector.

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

While defendant was not made specifically aware that the inspector would testify to the fact the fire burned for some time before its discovery, such testimony was well within the realm of that which should have been anticipated by the defense. The inspector's testimony reveals that he was under the impression that the fire was at 11:46 p.m.; thus, his further testimony that it had burned from thirty to forty-five minutes before discovery still places the fire's start within the hour beginning at 11:00 p.m. The defendant had been informed in discovery that the time of the offense alleged was 2300-2400 hours. If he did possess an alibi for 11:00 p.m., he was on notice that it was relevant to his defense against this charge, the state rule required its disclosure, and the trial justice was correct in finding that he was obliged to make the prosecution aware of this fact.

Finally, the Rhode Island Supreme Court considered the timing of the disclosure. Inspector Byrne, who supposedly brought the disputed evidence into sudden perspective, testified five days before defense counsel notified the court of the existence of an alibi witness. *State v. Bowling*, 585 A.2d at 1184.

The misconduct of this defendant exceeds that at issue in *Taylor*, where defense counsel acknowledged that he had been informed about the disputed witness by his client. Defense counsel in the present case, despite being alerted to the existence of the alibi witness by a statement provided by the prosecution in discovery well before trial, was evidently unaware of the importance of that witness and the significance of her proposed testimony. There has never, however, been any dispute that the defendant was always aware of Ms. Fagundes. It was

Bowling who informed his counsel of her identity and whereabouts. This was one of the key points made by the Rhode Island Supreme Court in its opinion. *State v. Bowling,* 585 A.2d at 1184. In its finding that there was no willful misconduct on the part of the defense, the First Circuit disregards the importance of this fact, choosing either to ignore the fact that defendant possessed this knowledge *or* to find that counsel's lack of willfulness places this case outside the scope of *Taylor*. Neither line of reasoning withstands scrutiny. In the first instance, it is a matter of record that defense counsel was informed about the witness and her place of employment by the defendant. *State v. Bowling,* 585 A.2d at 1184 n.2. Alternatively, the lack of any finding of deliberate misconduct on the part of defense counsel does nothing to buttress the Court of Appeals' holding. This Court's language in *Taylor* makes it abundantly clear that standards of conduct at trial apply to all parties – the prosecution, defense counsel and the defendant. Rejecting Taylor's argument that his counsel's lack of candor should not be imputed to him, this Court noted that an attorney must be afforded full authority to manage the conduct of a trial on behalf of his client. A requirement that investigation into the relative responsibilities of an attorney and his client before the sanction of preclusion could be applied due to misconduct would be highly impracticable. Emphasizing the inseparable nature of the relationship between the two, this Court remarked that "In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, *he or she speaks for the client.*" *Taylor,* 484 U.S. at 418, 108 S.Ct. at 658 [emphasis supplied].

In the case under consideration here, the defendant was at all times fully aware of the identity of the alibi witness, along with her whereabouts. His attorney, provided with notice of that witness' existence nearly two years before trial via the Doris Palmieri statement, certainly should have been aware of any possible relevance that individual might have to his client's case. In light of the Rhode Island court's finding that defendant "seized upon the alibi evidence after having heard the State's entire case," the Court of Appeals' determination that the sanction of preclusion was unjustified is clearly in error.

III. THE FIRST CIRCUIT'S DECISION SHOWED AN IMPROPER DISREGARD FOR STATE RULES OF CRIMINAL PROCEDURE.

In an effort to provide both the State and the defendant with the maximum amount of relevant information prior to trial, Rhode Island has enacted Superior Court Rule of Criminal Procedure 16, which has evolved into what has been described as "one of the most liberal discovery mechanisms in the United States." *State v. McParlin*, 422 A.2d 742, 744 (R.I. 1980); *State v. Darcy*, 442 A.2d 900, 903 (R.I. 1982). The rule's purpose is the prevention of surprise or procedural prejudice to either party. Under its provisions, the State is compelled, upon the defendant's request, to submit a list of its potential witnesses, along with a summary of the testimony each is expected to give at trial. The State must comply with such a request within fifteen days.

Rhode Island caselaw illustrates that the state supreme court has not been hesitant to grant a defendant

a new trial in cases where the State's compliance with this rule has been deficient or imperfect. *See State v. Simpson*, 595 A.2d 803 (R.I. 1991); *State v. Heredia*, 493 A.2d 831 (R.I. 1985); *State v. Adams*, 481 A.2d 718 (R.I. 1984); *State v. DiPrete*, 468 A.2d 262 (R.I. 1983); *State v. Verlaque*, 465 A.2d 207 (R.I. 1983); *State v. Diaz*, 456 A.2d 256 (R.I. 1983); *State v. Coelho*, 454 A.2d 241 (R.I. 1982); *State v. Darcy*, 442 A.2d 900 (R.I. 1982).

Moreover, the Rhode Island Supreme Court has set a more stringent standard for disclosure than that enunciated by this court in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985). The *Brady* rule mandates that due process is violated in those cases where a prosecutor fails to disclose exculpatory or material evidence. Material evidence was described over twenty years later in *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985), as evidence which would have changed the course of the proceedings had it been presented. In *State v. Wyche*, 518 A.2d 907 (R.I. 1986), the Rhode Island Supreme Court found that a prosecutor's failure to disclose evidence deemed exculpatory to the defense was intentional. Declining to adopt the State's argument that the evidence in question failed to meet the materiality standard pronounced in *Bagley*, the Rhode Island court determined that failure to disclose exculpatory evidence will not be governed by the material significance of the excluded evidence, but by the degree of prosecutorial culpability. When and if such a failure to disclose such evidence is deliberate, the Rhode Island Supreme Court will simply grant a new trial, irrespective of prejudice or harm to the defendant's case. *State v. Wyche*, 518 A.2d at 910.

While the Rhode Island discovery rule has been liberally interpreted in favor of defendants, the State's high court has also emphasized that the rule is reciprocal in nature, placing obligations on the defense as well as the State. A defendant who chooses to request discovery under the rule is in turn required by Super. Ct. R. Crim. P. 16(c) to notify the State of both his intention to rely upon an alibi defense along with specific details involved, including names and addresses of proposed alibi witnesses. *State v. Engram*, 479 A.2d 716, 718 (R.I. 1984). In *State v. Leddy*, 555 A.2d 356 (R.I. 1989), as in the case under consideration here, the defendant attempted to circumvent the rules of criminal procedure by proposing to offer the testimony of two alibi witnesses in the middle of trial. By way of explanation for the late disclosure, defense counsel told the court that the significance of these two witnesses had not become apparent until after he had interviewed one of the State's witnesses in more detail immediately before the trial commenced. In upholding the trial court's exclusion of the proposed evidence, the Rhode Island Supreme Court cited the trial justice's finding that the defendant had "embarked on a purposeful endeavor that culminated in a last-minute switch in tactics." The Rhode Island court also noted that had defendant been allowed to benefit from his eleventh-hour disclosure, great prejudice would have been visited upon the State, which could not have made appropriate adjustments to its case at such a late stage. The application of any remedy short of exclusion, as the trial justice had remarked, "would be to eviscerate the notice of alibi rule." *State v. Leddy*, 555 A.2d at 358.

It is well-settled in Rhode Island law that the imposition of any sanction on a party for violation of Rule 16 is a matter entrusted to the sound discretion of the trial justice. When determining the appropriate sanction to apply in such instances, the Rhode Island Supreme Court has developed a test involving four factors to be considered: (1) the reason for nondisclosure, (2) the extent of prejudice to the opposing party, (3) the feasibility of rectifying that prejudice by a continuance, and (4) any other relevant factors. *State v. Ramos*, 553 A.2d 1059, 1067 (R.I. 1989).

In this case, the Rhode Island Supreme Court applied this standard in considering the merits of the defendant's claim on direct appeal. As to the first factor, the court determined that the fire inspector's testimony afforded the defendant no excuse for the failure to disclose. The record reveals that when viewed in its proper context, the fire inspector's opinion indicated his belief that the fire began after 11:00 p.m., the time provided in the State's request for alibi. The court found that the delivery of Doris Palmieri's statement by the State to the defense, almost two years prior to trial, coupled with the defendant's knowledge of the witness and her exact whereabouts, made "any reason for nondisclosure unacceptable." Finally, the court cited defense counsel's failure to notify the court of his intention of calling the alibi witness for five days following the fire inspector's testimony. *State v. Bowling*, 585 A.2d at 1184.

Turning to the second prong of the test, the Rhode Island Supreme Court acknowledged that the defendant was prejudiced by the exclusion of his alibi witness; however, such prejudice was, in light of his knowledge of

the witness since the time of his arrest, along with his possession of the Palmieri statement, "self-inflicted." *State v. Bowling*, 585 A.2d at 1184. In considering whether the prejudice could have been rectified by a continuance, the Supreme Court agreed with the trial justice's finding that this alternative was not an appropriate one because petitioner had "seized upon this [alibi] having heard the state's entire case and [after] the state had rested." *State v. Bowling*, 585 A.2d at 1184.

As a final consideration, the Rhode Island court acknowledged the prejudice which would have inured to the State, possibly substantially altering its theory of the case, had the defendant been allowed to present this witness. The provisions of Super. Ct. R. Crim. P. 16 mandated the disclosure of the witness to the State even if her whereabouts were unknown.

The Rhode Island Supreme Court's analysis of the issue under Super. Ct. R. Crim. P. 16 led that court to conclude that the sanction of exclusion had properly been imposed. Significantly, that court remarked that "We see no reason to disagree with the trial justice's conclusion that the defendant employed a last minute switch in tactics" in making this determination. *State v. Bowling*, 585 A.2d at 1185. Despite the unambiguous nature of this finding, the Court of Appeals chose to disregard it, concluding instead that no finding of willful misconduct was made below.

This Honorable Court has repeatedly emphasized the respect that is due state procedural rules: "We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States

that results from the failure of federal courts to respect them." *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2565 (1991) (quoting *McClesky v. Zant*, 499 U.S. 467, ___, 111 S.Ct. 1454, 1468 (1991)).

The State of Rhode Island respectfully submits that this case demonstrates precisely such lack of respect by a federal court. In *Reed v. Ross*, 468 U.S. 1, 13-14, 104 S.Ct. 2901, 2902 (1984), Justice Brennan stated "that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct." The State of Rhode Island possesses a legitimate interest in the orderly procedure of criminal trials conducted within its jurisdiction and has enacted rules to ensure that this occurs. In this case, a defendant deliberately flouted one of the aforementioned rules by waiting until the middle of his trial to produce a witness whose importance was evident from the commencement of this case. In finding that he was justified in so doing, the First Circuit Court of Appeals has implicitly sanctioned this defendant's disregard for the state procedural provisions governing criminal trials.

CONCLUSION

The decision of the First Circuit Court of Appeals conflicts with prior decisions from this Court in its interpretation of *Taylor v. Illinois*, exceeds its jurisdiction as a court of review in disregarding state findings of historical fact, and sanctions disregard for state rules of criminal

procedure. The Petition for Writ of Certiorari should be granted to correct these errors.

Respectfully submitted,

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APPENDIX A

Thomas P. BOWLING, Plaintiff-Appellant,

v.

George A. VOSE, Director of the Department of Corrections, State of Rhode Island, et al., Defendants-Appellees.

No. 93-1037.
United States Court of Appeals,
First Circuit.

Heard June 7, 1993.
Decided Sept. 10, 1993.

Petition was filed for writ of habeas corpus. The United States District Court for the District of Rhode Island, Francis J. Boyle, J., denied relief. Petitioner appealed. The Court of Appeals, Torruella, Circuit Judge, held that petitioner should have been allowed at arson trial to present testimony of alibi witness; however, remand was required for determination of whether there was substantial prejudice warranting habeas relief.

Remanded.

Paula Lynch Hardiman, Providence, RI, for appellant.

Jane M. McSoley, Asst. Atty. Gen., Appellate Division, with whom Jeffrey B. Pine, Atty. Gen., Providence, RI, was on brief, for appellee State of RI.

Before TORRUELLA, Circuit Judge, CAMPBELL, Senior Circuit Judge, and BOUDIN, Circuit Judge.

TORRUELLA, Circuit Judge.

In this habeas corpus action, appellant was convicted of first-degree arson in Rhode Island. He claims that the trial judge excluded an alibi witness in violation of his Sixth Amendment rights, and we agree.

In the prosecution's request for discovery information prior to trial, the prosecution specified that the suspect fire started between 11:00 p.m. and 12:00 a.m., on June 7, 1986, at his apartment building in Pawtucket, Rhode Island. In complying with the request appellant did not aver an alibi defense, although Rhode Island Rule of Criminal Procedure 16 requires a defendant to provide such notice within 21 days of receipt of the state's demand.[1] Appellant claims that he was unaware of any alibi for that evening between 11:00 p.m. to 12:00 a.m. Appellant prepared his defense accordingly.

At trial, the state presented the testimony of Donald Byrne, a fire investigator. On cross-examination, he stated that the fire actually started thirty to forty-five minutes before it was discovered.[2] Appellant's counsel then calculated that, according to the inspector, the fire must have

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[1] The rule provides that "upon demand by the attorney for the State and delivery by him or her to the defendant of a written statement describing with specificity the date and time when and the place where the offense charged is alleged to have occurred, the defendant, within twenty-one (21) days after receipt of such demand and particulars, shall give written notification whether he or she intends to rely in any way on the defense of alibi." R.I.Sup.Ct.R.Crim.P. 16.

[2] Inspector Byrne believed that the fire was reported at 11:46 p.m., and testified as such. However, the Pawtucket Fire Department reported that it was informed about the fire at 11:34 p.m. The latter report would seem to be the most definitive evidence of the actual starting time. It is apparently the state's

started between 10:49 and 11:04 p.m. This new time period obviously was somewhat removed from the 11:00 p.m. to 12:00 a.m. period that counsel had previously focused on in preparing the defense.

The revised time window suggested a new defense. Counsel remembered an affidavit, supplied during discovery by the state, from appellant's common-law wife, Doris Palmieri.[3] Ms. Palmieri stated that appellant had picked her and her sister up at a club in Providence sometime after ten o'clock. Because a witness placed appellant at the building at 10:34 p.m., and others saw him there before then, counsel inferred that he did not leave to pick up his wife until after approximately half past ten.

Counsel then tracked down Ms. Palmieri's sister, Jenette Fagundes, and learned that after picking up the sisters at the club, appellant drove her home before returning to Pawtucket. Counsel determined that appellant could not leave Pawtucket after 10:34 p.m., drive to the club in Providence, take Ms. Fagundes to her home in Providence, and return to Pawtucket in time to start the fire by 11:04 p.m. Appellant therefore could not have burned down the building.

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view that Inspector Byrne's estimate that the fire started thirty to forty-five minutes before discovery depended on the assumption that the fire did not start until 11:46. We see no basis for this assumption and think that, at the very least, the testimony is reasonably open to the interpretation that the fire had been started thirty to forty-five minutes before it was actually discovered.

[3] Ms. Palmieri passed away shortly after the fire, of causes unrelated to the fire.

After the state closed its evidence, and five days after the fire inspector testified, counsel petitioned the court to allow Ms. Fagundes to testify. He stated that he did not recognized the relevance of her story until the fire inspector testified about when the fire started. Furthermore, he did not learn Ms. Fagundes' name or address until two days later. The state responded that it would not oppose the motion if it could introduce Ms. Palmieri's statement, which contained incriminating facts, in full as rebuttal. In it, Ms. Palmieri revealed that upon arriving at the apartment building, appellant told her that she should sleep elsewhere.

The trial judge took a recess to ponder the matter and ultimately decided to exclude Ms. Fagundes' testimony. The judge noted that appellant had the Palmieri statement well before the trial, and that it sufficiently raised the possibility of the alibi. Because Rule 16 imposed an affirmative duty on appellant to disclose reliance on an alibi, even if the name of the witness was unknown, the judge found that appellant had violated discovery. The judge excluded the alibi testimony as a sanction under *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). The judge determined that defendant "seized upon this tact having heard the state's entire case and the state rested," and cited the need to ensure the "orderly administration of justice."

In contrast to the proffered alibi, the inculpatory evidence at trial was substantial. Two eyewitnesses saw appellant in the vicinity of the fire overcome by smoke; one saw him running from the building. another eyewitness saw appellant throwing lighted paper into a vent

leading to the first floor of the building. Witnesses testified that appellant threatened the building's owners shortly before the fire. Another witness apparently testified that appellant had warned the witness to leave the building. Swayed by this evidence, the jury rendered a guilty verdict and appellant received a 25 year sentence.

Appellant bases his argument on the Sixth Amendment, which states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." Of course, the "right to compel a witness' presence in the courtroom" would be meaningless "if it did not embrace the right to have the witness' testimony heard by the trier of fact." *Taylor*, 484 U.S. at 409, 108 S.Ct. at 653. Exercise of the right thus assists the adversary process in its truth-seeking function by ensuring that the trial court hears the full array of admissible facts pertinent to the case. The Court in *Taylor* noted that "few rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 408, 108 S.Ct. at 652.

It is not an absolute right, however. Given the demands of the adversary system, the Court in *Taylor* found that a trial court may exclude a defense witness without trampling on the Sixth Amendment. The Court issued no hard test; rather, it listed various considerations that a judge could use as a guide. These include the "integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process." *Id.* at 414-15, 108 S.Ct. at 656. If these concerns outweigh the

defendant's interest in presenting witnesses, the trial court can properly exclude the testimony.[4]

Courts thus have upheld the exclusion of a witness when a party willfully violates the discovery rules to gain a tactical advantage in litigation. In *Taylor*, for instance, it was "plain that the case fit[] into the category of willful misconduct in which the severest sanction is appropriated." *Id.* at 417, 108 S.Ct. at 657. The proposed testimony appeared to be fabricated – "witnesses [were] being found that really weren't there." *Id.* In *Michigan v. Lucas*, ___ U.S. ___, ___, 111 S.Ct. 1743, 1748, 114 L.Ed.2d 205 (1991), the Court explained its earlier holding: "We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be 'adequate and appropriate in most cases' " (quoting *Taylor*, 484 U.S. at 4 13, 108 S.Ct. at 655). The Court in *Lucas* justified the imposition of the severest sanction of exclusion in *Taylor* by noting the willful character of the discovery violation.

Indeed, most circuit court cases affirming exclusion in response to discovery violations involved willful conduct. *See United States v. Johnson*, 970 F.2d 907, 911 (D.C.Cir.1992); *United States v. Milan*, 966 F.2d 1165, 1175 (7th Cir.1992); *Horton v. Zant*, 941 F.2d 1449, 1467 (11th Cir.1991); *United States v. Peters*, 937 F.2d 1422, 1426 (9th

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[4] The trial judge and the Rhode Island Supreme Court conducted the required weighing of factors elaborated in *Taylor* and concluded that the exclusion of the alibi evidence was an appropriate sanction. As the application of *Taylor* is a legal question, we review this ruling de novo and arrive at the opposite conclusion.

Cir.1991); *Eckert v. Tansy*, 936 F.2d 444 (9th Cir.1991); *Escolera v. Coombe*, 852 F.2d 45, 48 (2d Cir.1988); *Chappee v. Vose*, 843 F.2d 25 (1st Cir.1988). The Ninth Circuit has even interpreted *Taylor* to mean that exclusion is permissible only when the case involves misconduct. *Peters*, 937 F.2d at 1426.

In this case, there was no such misconduct. Appellant did not, and could not, learn that the fire was set between 10:49 to 11:04 p.m., until the fire inspector was cross-examined at trial. Appellant proceeded on the theory that 11:00 p.m. to 12:00 a.m. was the relevant time period simply because the government suggested that it was the relevant time period.[5] While counsel could have learned about appellant's travels on the night in question with some ease from the Palmieri statement, we view counsel's ultimate failure as negligence at worst.[6]

In this circumstance, it is obvious that concerns related to the integrity of the trial process do not weigh in

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[5] The reporter's notes appended to Rule 16 recognize the significance of the state-provided time of offense. "Unless defendant is given specific information about the time and place of the offense, his ability to predict whether or through whom he will raise the defense of alibi may be impaired." Sup.Ct.R.Crim.P. 16 reporter's notes to 1974 amendment.

[6] The trial court not only failed to make any explicit finding of willful misconduct, *see Bowling v. Vose*, No. 91-0472, slip op. at 3 (D.R.I. Nov. 13, 1992), it seemingly concluded to the contrary. In its exclusionary ruling, the court stated that it was "not persuaded that [offering an alibi witness] was the defendant's original intention. . . . " Without such an intent to violate the discovery rules, the fact that defense counsel later felt that an alibi witness should be called would not be indicative of bad faith or misconduct.

favor of exclusion. Indeed, exclusion of an exculpatory and potentially reliable alibi would distort the truth-seeking function of trial. The proposed testimony does not threaten to pollute the trial with unreliable evidence; it corroborates a written statement that the prosecution itself was content to use. The fact that no willful misconduct prevented timely disclosure of the alibi also allays fears of fabrication and untruthfulness.

The prosecution could have received a continuance to investigate the alibi and cross-examine Ms. Fagundes about the night in question. Furthermore, the proposed testimony was not particularly scientific or technical in nature, which could have imposed a hardship on the government in preparing a cross-examination on short notice. Given the unintentional nature of the violation in this case, we see no threat to the trial process as a whole.

Undoubtedly the interest in the fair and efficient administration of justice is burdened by the introduction of a new defense theory after the government has closed its evidence. Alternative remedies exist, however, which adequately and appropriately address fairness and efficiency. Rhode Island Rule 16 does not limit trial judges to exclusion as the only sanction for a violation of its discovery rules. It lists less severe remedies such as requiring the offending party to reveal the discovery or inspection, granting a continuance, or entering "such other order as it deems appropriate." R.I.Sup.Ct.R.Crim.P. 16(i).

Given the important nature of the proposed testimony to the defendant, and the nonwillful character of the offense, we find that concerns over fairness and efficiency are not sufficiently weighty to justify the denial of

appellant's Sixth Amendment rights. Indeed, the trial court's concern over fairness and efficiency seems less credible when the prosecution itself was willing to have the evidence admitted. This is one of those cases in which a less severe sanction than exclusion of a witness was "adequate and appropriate." *Taylor*, 484 U.S. at 413, 108 S.Ct. at 655.

Although we have found that error of constitutional magnitude infected this case, our analysis is not over. Before a writ of habeas corpus may issue, that error must have been sufficiently prejudicial to defendant's rights to warrant habeas relief. As the Supreme Court has framed the inquiry, the error must have "had substantial or injurious effect or influence in determining the jury's verdict." *Brecht v. Akmanson*, ___ U.S. ___, ___, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993) (citing *Kottenkos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). As this standard is "grounded in the federal harmless-error rule (28 U.S.C. § 2111), federal courts may turn to an existing body of case law in applying it." *Id.* ___ U.S. at ___, 113 S.Ct. at 1722.

On the record we have before us, we cannot make a sufficiently appropriate determination on whether the *Taylor* violation in this case meets this standard. The district court is in a better position to evaluate this issue in the first instance, as the inquiry entails a determination of the exact nature and force of Ms. Fagundes' proposed testimony and an effort to place her testimony within the context of the evidence as a whole. In short, the weight of her testimony must be balanced against the weight of the inculpatory evidence in this case, which is substantial.

We therefore *remand* the case to the district court for a determination of this issue. The district court should hold such hearings as necessary.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 93-1037.

THOMAS P. BOWLING,
Plaintiff-Appellant,

v.

GEORGE A. VOSE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, STATE OF RHODE ISLAND, ET AL.,
Defendants-Appellees.

BEFORE:
Campbell, *Senior Circuit Judge,*
Torruella, and Boudin, *Circuit Judges.*

ORDER OF THE COURT
Entered: October 20, 1993

Upon consideration of appellees' petition for rehearing,

It is ordered that said petition be denied.

By The Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc:Ms.'s. Hardiman, McSoley]

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 93-1037.

THOMAS P. BOWLING,
Plaintiff-Appellant,

v.

GEORGE A. VOSE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, STATE OF RHODE ISLAND, ET AL.,
Defendants-Appellees.

ORDER OF THE COURT

Entered: October 26, 1993

Upon consideration of appellee's motion to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari,

It is ordered that mandate be stayed until November 26, 1993. Notice of such filing to be promptly filed with the Clerk of this Court.

By The Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc:Ms.'s. Hardiman, McSoley]

APPENDIX D

AC 450 Rev 5:85 Judgment in a Civil Case

UNITED STATES DISTRICT COURT
JUDICIAL DISTRICT OF RHODE ISLAND

THOMAS P. BOWLING

V.

GEORGE VOSE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, STATE OF RHODE ISLAND

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 91-0472B

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

xx **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered

IT IS ORDERED AND ADJUDGED that judgment enter for the defendant in accordance with the Opinion entered 11/13/92.

11/13/92
Date

Clerk

/s/ Lorrane Kizior
(By) Deputy Clerk

EXHIBIT 'A'

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

THOMAS P BOWLING

V.

C.A. No. 91-0472

GEORGE VOSE, DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, STATE OF RHODE ISLAND

OPINION

Thomas Bowling has presented a petition for writ of habeas corpus following his conviction for first degree arson in connection with a fire at his apartment building. The gravamen of Bowling's petition is that he was not permitted to introduce an alibi witness at trial and consequently was denied his rights pursuant to the Compulsory Process Clause of the Sixth Amendment of the Constitution.

The trial judge excluded Bowling's alibi witness as a discovery sanction because the witness had not been identified to the State when the State requested the names of any alibi witnesses two years earlier. When the State produced its discovery materials it demanded that defendant give written notification of intent to rely in any way on the defense of alibi. For more than two years there was no response by the defendant. Indeed, the witness was identified by defendant as an alibi witness only after the State rested. The relevant time frame provided by the State in its request was June 7, 1986, 11:00 p.m. to 12:00 midnight.

Bowling's attorney claims that he did not provide the witness' name earlier because, believing the fire to have occurred shortly before 11:34 p.m., he did not intend to rely on alibi evidence. At trial, a fire inspector testified that he believed that the fire was discovered at 11:46 p.m. and that the fire probably started somewhere between half to three quarters of an hour before it was discovered. This would estimate the time the fire started to be somewhere between 11:01 p.m. and 11:16 p.m. The Report of the Division of Fire Safety states a time of discovery of the fire as 11:34 p.m. which, adopting the fire inspector's opinion, would suggest that the fire started between 10:49 p.m. and 11:04 p.m. Under either circumstance, the fire could have been started at 11:00 p.m. or thereafter Bowling's attorney requested that he be permitted to introduce into evidence the testimony of an alibi witness, Bowling's sister-in-law Jeannette Fagundes, who would provide an alibi for Bowling between the hours of 10:45 p.m. and 11:30 p.m. (Bowling had been placed at the scene by other eyewitnesses at 10:36 p.m., and again at 11:30 p.m.) Bowling's attorney argued that it wasn't until he cross-examined the fire inspector that he realized the significance of Fagundes' testimony.

The defendant's attorney knew of the existence of the alibi witness long before the State had rested its case. The defendant's wife had given the police a statement which included the fact that the defendant had given her sister and herself a ride home that evening from a bar in neighboring Providence. The defendant's sister in law was allegedly dropped off at her residence in Providence and then defendant returned to Pawtucket with his wife. The defendant contended that this journey would have

consumed the time between 10:45 p.m. and 11:00 p.m. Defendant's wife died before the start of the trial. Her statement, however, was available to defendant's counsel two years before the trial.

The trial judge concluded that Bowling's attorney had seized upon the abili defense only after hearing the state's entire case, and excluded the Fagundes testimony. He made it quite clear that he was relying on *Taylor v. Illinois*, 484 U.S. 400 (1987), as the basis for his ruling.

The Rhode Island Supreme Court upheld Bowling's conviction, finding that the trial judge's exclusion of Fagundes' testimony comported with the U.S. Supreme Court guidelines announced in *Taylor v. Illinois See State v. Bowling*, 585 A.2d 1181 (R I 1991). There, the Rhode Island Supreme Court noted that it wasn't until five days after the inspector's testimony (when the State had put forth its entire case) that defense counsel notified the state of his desire to put forth alibi evidence. *Id.* at 1184.

In *Taylor v. Illinois*, the Court held that a trial judge may, consistent with the Sixth Amendment, exclude evidence as a discovery sanction. 484 U.S. at 402. However, when deciding whether to exclude evidence, the trial judge must weigh the defendant's right to compulsory process against the countervailing public interests 1) the integrity of the adversary process, 2) the interest in the fair and efficient administration of justice, and 3) the potential prejudice to the truth-determining function of the trial process. *Id.* at 414-15. The judge should also factor into the mix the nature of the explanation given for the party's failure seasonably to abide by the discovery request, whether or not the violation was willful and

motivated by a desire to gain a tactical advantage, and the relative simplicity of compliance. *Id.* at 415.

Preclusion of a witness' testimony as a discovery sanction may be imposed for flagrant, willful violations of the discovery process. *See, e.g., Taylor v. Illinois,* 484 U.S. 400 (1987), *see also Chapee v. Vose,* 843 F.2d 25 (1st Cir. 1988). Here there is no specific factual finding by the trial judge that the violation was willful. In his ruling precluding the proffered testimony, the trial judge did say: "for the record, if you're interested, the Court has relied upon the case of *State v. Ingram,* [sic] 479 A.2d 716, and also the *Taylor* case which I am not sure. Mr. Anderson (defendant's counsel), really supports your theory." (Trial transcript at 249.) The reference to *Taylor* is an obvious reference to *Taylor v. Illinois.*

It was clear what was meant when the trial judge said that the defense attorney "seized upon [the alibi] tactic" only after the State had rested. The trial judge appears to have conducted the balancing required by *Taylor,* finding that the orderly administration of justice would be impeded by a continuance. He held that a continuance would not be appropriate:

> because the State had rested, a key factor in the Court's decision. One must remember that the Court is also responsible to ensure the orderly administration of justice. Consequently, because the defendant failed to comply with Rule 16(C) [the discovery rule] and the fact that the State has rested, having presented its case on one theory, and if the testimony were allowed would be required to substantially alter its theory in rebutta!, the motion to allow Jeannette Fagundes to testify is denied.

(Trial transcript at 248-49.)

The tactic employed by defense counsel certainly questioned the integrity of the judicial process and the rejection of the witness was prompted by the Court's interest to see to the fair and efficient administration of justice. Likewise, the tactic employed was prejudicial to the truth-determining function of the trial. As the Supreme Court stated in *Taylor:*

> [a] trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of the trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory process clause simply to exclude the witness' testimony. Cf. *United States v. Nobles,* 422 U.S. 225 (1975).

Id. at 415.

This case fits neatly into the requirements of *Taylor v. Illinois.* There was no error of Constitutional dimension by the trial court, hence the petition for writ of habeas corpus must be denied.

So Ordered.

/s/ Francis J. Boyle
Francis J. Boyle, Chief Judge
November 13, 1992

APPENDIX E

STATE

v.

Thomas P. BOWLING.

No. 89-215-C.A.

Supreme Court of Rhode Island.

Jan. 31, 1991.

Defendant was convicted in the Superior Court, Providence County, Cresto, J., of arson, and he appealed. The Supreme Court, Kelleher, J., held that exclusion of alibi testimony as discovery sanction was warranted.

Affirmed.

James E. O'Neil, Atty. Gen., Jeffrey Greer, Asst. Atty. Gen., Jane McSoley, Sp. Asst. Atty. Gen., for plaintiff.

Lauren E. Jones, Jones Associates, Providence, for defendant.

OPINION

KELLEHER, Justice.

On June 7, 1986, Peter Brown (Brown), a resident of Pawtucket, retired at about 9:30 p.m. A short time later,he awoke to the sound of fire trucks outside his building. When he went outside to investigate, he soon learned that there had been a fire in a dumpster behind an adjacent apartment building located at 502 Pawtucket Avenue (apartment building). Brown also noticed his neighbor Thomas P. Bowling (Bowling), a resident of 502 Pawtucket Avenue, with the firefighters.

When Brown returned home, he observed Bowling driving his car on Pawtucket Avenue and then saw him turn around and park the vehicle in front of the apartment building. A short time later Brown left the premises and walked his dog. As he passed by the apartment building, he noticed smoke coming out of a side entrance. Brown watched as Bowling ran into a side entrance and emerge therefrom ten to fifteen seconds later. At this point Bowling was coughing and choking.

Firefighter Ronald Doire (Doire) was a witness at the trial. Doire explained to the jury that he responded to a call of a building fire at 502 Pawtucket Avenue. As he entered the hallway of the apartment building, he discovered an individual who had been overcome by smoke. This individual later was identified as Bowling. Doire assisted Bowling out of the apartment building and returned to combat the fire.

When Inspector Donald Byrne (Byrne), a representative from the State Fire Marshal's Office, arrived at around 1 a.m., the fire was still burning. Byrne testified that based upon his observations, his belief was that the fire had been burning anywhere from one-half to three-quarters of an hour before it was discovered. This witness reported that the fire was discovered at about 11:46 p.m. Byrne also testified that the fire was incendiary in nature and not accidental.

Thomas Miguel (Miguel) resided in the apartment building and was related to Bowling.[1] Miguel testified

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[1] Bowling had a common-law marriage with Doris Palmieri (Palmieri). Palmieri's daughter, Angelina, was married to Miguel. Miguel and Angelina had a daughter named Tammy.

that as he was preparing to go out that evening, he heard his daughter, Tammy, scream. As he ran outside, Miguel observed Bowling holding a flaming bag. When Miguel asked Bowling what he was doing, Bowling replied, "I'll pay the son of a bitches back, raising my rent." Miguel said, "I'm taking my daughter out of this house." Bowling then replied, "the best thing you can do is take your family out of here."

A few days after the fire Tammy gave a statement to the police in which she indicated that she had watched as her grandfather attempted to throw some lighted paper into a vent leading into the first floor of the apartment building. In addition Tammy also reported that Bowling told her that he was going to set the building on fire because the landlords, Mildred and Gerald Coutu, had raised his rent. However, Tammy later changed her story at trial and indicated that she had lied in her earlier statement.

Mildred and Gerald Coutu also testified at trial. Mildred Coutu said that she received a telephone call at 7:50 p.m. on the evening of the fire. Although the caller was slurring his words, Mildred Coutu recognized the voice as belonging to Bowling, who was one of her tenants. Bowling complained about an increase in his rent and demanded that it be lowered. When Mildred Coutu told Bowling that he was free to move out, Bowling threatened her with a lawsuit.

The following day the Coutus went to the apartment building to survey the damage and clean up the debris. As Miguel and Tammy approached them, Mildred Coutu testified, Tammy said, "[Bowling] did it, didn't he?

* * * He said that he was going to do this, set the house on fire." Gerald Coutu testified that Miguel had told Bowling that "you could get twenty years for this" in a conversation regarding the fire.

The final character in this drama was Palmieri, Bowling's common-law wife. Palmieri gave a written statement to the police a day after the fire. The statement related that on the night of the fire Bowling picked up Palmieri along with her sister, Jeannette Fagundes (Fagundes), and a friend at a club in Providence. The quartet then drove back to the Pawtucket Avenue apartment building. Upon entering the apartment building, Bowling told Palmieri that she should not sleep in the apartment building that night. A short time later the building was on fire. Palmieri died of causes unrelated to the fire in 1986.

In early November 1986 Bowling made a motion for discovery and inspection. The Palmieri statement was part of the information package that the state delivered to Bowling. Later that same month the state also sought discovery and inquired whether Bowling was going to rely on the defense of an alibi. This request demanded, among other things, "[a] statement as to whether the defendant intends to rely on the defense of alibi, if the defendant does intend to so rely, furnish[ing] with specificity the place the defendant claims to have been at the time or times of the alleged offense and the names and addresses of all witnesses he intends to call at trial to establish such alibi."

Pursuant to Rule 16(c) of the Superior Court Rules of Criminal Procedure, the state provided to Bowling both

the date of the offense and the place of the offense. The state alleged that the fire occurred on June 7, 1986, between 11 p.m. and midnight.

After discovery proceedings ended, the trial began. After the state rested, Bowling's counsel submitted a belated response to the state's discovery request. This response came almost two years after the state's initial request and once the state had rested.

The defense notified the state that Bowling intended to rely on an alibi. Bowling's attorney stated that Fagundes would testify that on the evening of June 7, 1986, she, her sister (Palmieri), and a roommate were in Providence, at the Lithuanian Club on Smith Street. Sometime after 10 p.m., Bowling picked up the threesome and drove them to Fagundes's house at 965 Chalkstone Avenue where Fagundes and her roommate were dropped off. Bowling and Palmieri then returned to the apartment building on Pawtucket Avenue.

The state objected to any introduction of evidence of alibi at that point. The trial justice then called a recess and considered whether he was going to permit the testimony of Fagundes. The trial justice noted that Rule 16 "is not a one-way street." That is, whereas a defendant has a right to submit exculpatory evidence, the state has the reciprocal right to discovery, "including possible alibi information within the prescribed time limits." The trial justice then imposed the discovery sanction and excluded Fagundes's testimony.

Subsequently a jury found Bowling guilty. The trial justice sentenced Bowling to twenty-five years in prison with fifteen years to serve and ten years suspended with

probation. Bowling appeals from this conviction of first-degree arson.

Bowling claims that the trial justice committed error in excluding Fagundes's testimony at trial. Bowling bases his challenge on two independent grounds. Bowling first claims that the trial justice erred with respect to state law in imposing the discovery sanction and excluding the alibi testimony. Bowling also argues that that trial justice committed constitutional error in not allowing the Fagundes testimony. Each of these claims will be addressed.

The first issue is whether the trial justice erred in imposing the discovery sanction and excluding Fagundes's testimony. This court has adopted a four-part test to determine whether a discovery sanction is appropriate. The test considers (1) the reason for the non-disclosure, (2) the extent of prejudice, (3) the feasibility of rectifying the prejudice by a continuance, and (4) any other relevant factors. *State v. Leddy*, 555 A.2d 356, 358 (R.I.1989); *State v. Boucher*, 542 A.2d 236, 241 (R.I.1988); *State v. Ricci*, 472 A.2d 291, 299 (R.I.1984).

Bowling's counsel attributes the delay in disclosing the alibi evidence to the testimony of Inspector Byrne. Bowling's attorney claims that until Byrne testified, there was no evidence concerning when the fire started. As noted earlier, Byrne testified that the fire started thirty to forty-five minutes before it was discovered. Byrne also said that he believed the fire was discovered at 11:46 p.m. This would establish the starting time of the fire as 11:01 to 11:16 p.m. This fifteen-minute time frame falls within

the state's request of an alibi that stated 11 p.m. to midnight as the time of the offense. Thus the Byrne testimony affords no excuse for the delay of nondisclosure, as the state had requested notification of Bowling's intent to use an alibi almost two years before he claimed the alibi.

In addition, Palmieri's statement notifying Bowling's counsel of Fagundes's identity was also made available almost two years before trial. This notification, coupled with Bowling's actual knowledge of Fagundes's existence and whereabouts,[2] makes any reason for nondisclosure unacceptable. Lastly, even if it took Byrne's testimony to bring the alibi to light, Bowling's counsel waited five days before notifying the state of the desire to put forth alibi evidence. In the span of these five days, the state had put forth its entire case and had rested.

We must also consider the extent of prejudice to Bowling. Although it is true that Bowling was prejudiced by the exclusion of Fagundes's testimony, we note that the jury could have chosen not to believe such testimony. More importantly, any prejudice to Bowling was largely self-inflicted. The Palmieri statement was in Bowling's possession as of November 1986, and Bowling knew about Fagundes.

The third aspect of the test requires us to consider the possibility of rectifying the prejudice by issuing a continuance. In this case the trial justice based his sanction largely on the fact that the state had already rested. That

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[2] It was Bowling who notified his counsel of Fagundes's place of employment, where counsel found Fagundes to be working.

is, the trial justice believed that Bowling "seized upon this [alibi] having heard the state's entire case and [after] the state had rested." Thus, the trial justice properly felt that a continuance was not feasible.

We must also consider other relevant factors. The trial justice properly noted the prejudice to the state if the Fagundes testimony was allowed. The trial justice pointed out that pursuant to the rules of discovery, Bowling was obligated to inform the state of any intention to use an alibi defense even if the identity or whereabouts of the witness was unknown.

We believe that the trial justice touched all the bases in imposing the discovery sanction. *See State v. Leddy*, 555 A.2d at 358. We see no reason to disagree with the trial justice's conclusion that Bowling employed a last-minute switch in tactics. *Id.* We therefore conclude that the trial justice did not err in excluding the Fagundes testimony.

We now move on to the second argument put forth by Bowling. Here, Bowling claims that the trial justice's discovery sanction violated Bowling's Sixth Amendment right under the Compulsory Process Clause. After consideration we reject this argument as well.

Under the Compulsory Process Clause of the Sixth Amendment of the United States Constitution, the criminal defendant has the right to present his own witnesses to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967) (incorporating the Compulsory Process Clause of the Sixth Amendment into the Due Process Clause of the Fourteenth Amendment). The Compulsory Process Clause, however, does not vest a defendant with the power to

offer testimony free from the requisites of the adversarial system. *United States v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160, 2171, 45 L.Ed.2d 141, 155 (1975).

As the United States Supreme Court pointed out in *Taylor v. Illinois*, 484 U.S. 400, 415, 108 S.Ct. 646, 655-56, 98 L.Ed.2d 798, 814 (1988):

> "A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of crossexamination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purpose of the Compulsory Process Clause simply to exclude the witness' testimony."

In this controversy the trial justice heard Bowling's arguments in support of the failure to disclose the identity of Fagundes until after the state had rested. The trial justice concluded that Bowling seized upon the alibi defense after having heard the state's entire case. The trial justice then imposed the discovery sanction and refused to allow the Fagundes testimony into evidence. Given the constitutional standards involved, we do not believe that the exclusion of the alibi testimony violated Bowling's Sixth Amendment right under the United States Constitution. *See Taylor v. Illinois*, 484 U.S. at 415-16 nn.20, 21, 108 S.Ct. at 656 nn.20, 21, 98 L.Ed.2d at 814-15 nn.20, 21.

In summation we believe that the trial justice did not err in imposing the discovery sanction and excluding

Fagundes's proffered testimony. Bowling's appeal is denied and dismissed. The judgment of conviction is affirmed.

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Thomas BOWLING, petitioner, v. RHODE ISLAND. No. 90-7924.

Case below, 585 A.2d 1181.

Petition for writ of certiorari to the Supreme Court of Rhode Island.

June 10, 1991. Denied.

APPENDIX F

16. Discovery and inspection. – (a) *Discovery by Defendant.* Upon written request by a defendant, the attorney for the State shall permit the defendant to inspect or listen to and copy or photograph any of the following items within the possession, custody, or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the State:

(1) all relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the defendant, or copies thereof;

(2) all relevant recorded testimony before a grand jury of the defendant, or in the case of a corporate defendant, of any present or former officer or employee of the defendant corporation concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to his or her employment;

(3) all written or recorded statements or confessions which were made by a co-defendant who is to be tried together with the moving defendant and which the State intends to offer in evidence at the trial, and written summaries of oral statements or confessions of such as co-defendant in the event the State intends at the trial to offer evidence of such oral statements or confessions;

(4) all books, papers, documents, photographs, sound recordings, or copies thereof, or tangible objects, buildings, or places which are intended for use by the

State as evidence at the trial or were obtained from or belong to the defendant;

(5) all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

(6) a written list of the names and addresses of all persons whom the attorney for the State expects to call as witnesses at the trial in support of the State's direct case;

(7) as to those persons whom the State expects to call as witnesses at the trial, all relevant recorded testimony before a grand jury of such persons and all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such testimony or statement of a witness is in the possession of the State, a summary of the testimony such person is expected to give at the trial;

(8) all reports or records of prior convictions of the defendant, or of persons whom the attorney for the State expects to call as witnesses at the trial, and within fifteen (15) days after receipt from the defendant of a list produced pursuant to paragraph (b)(3) of persons whom the defendant expects to call as witnesses all reports or records of prior convictions of such persons;

(9) all warrants which have been executed in connection with the particular case and the papers accompanying them, including affidavits, transcripts of oral testimony, returns and inventories.

(b) *Discovery by the State.* A defendant who seeks any discovery under subdivision (a) of this rule shall permit the State, upon receipt of written request, to inspect or listen to and copy or photograph any of the following items within the possession, custody or control of the defendant or the defendant's attorney:

(1) all books, papers, documents, photographs, sound recordings or copies thereof, or tangible objects, buildings, or places which are intended for use by the defendant as evidence at the trial;

(2) all results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and prepared by a person whom the defendant intends to call as a witness at the trial and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

(3) a written list of the names and addresses of all persons other than the defendant whom the defendant expects to call as witnesses at the trial in the event the State presents a prima facie case;

(4) as to those persons other than the defendant whom the defendant expects to call as witnesses at the trial, all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such statement of a witness is in the possession of the defendant, a summary of the testimony such person is expected to give at the trial.

(c) *Notice of Alibi.* In the event a defendant seeks any discovery under subdivision (a) of this rule, then upon demand by the attorney for the State and delivery by him or her to the defendant of a written statement describing with specificity the date and time when and the place where the offense charged is alleged to have occurred, the defendant, within twenty-one (21) days after receipt of such demand and particulars, shall give written notification whether he or she intends to rely in any way on the defense of alibi. If the defendant does so intend, the notice shall state with specificity the place at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses the defendant intends to call at the trial to establish such alibi. Within twenty-one (21) days after receipt of written notification of intent to rely on the defense of alibi, together with particulars thereof, the attorney for the State shall furnish to the defendant written notice of the names and addresses of the witnesses whom the State intends to call at the trial to establish defendant's presence at the place where and the time when the offense is alleged to have occurred.

(d) *Material Not Subject to Discovery.* Except as provided in subdivisions (a) and (b), this rule does not authorize discovery of internal reports, memoranda, or other documents made by a defendant, or his or her attorney or agent, or by the attorney for the State, or by officers or agents of the State, in connection with or in preparation for the prosecution or defense of a criminal proceeding.

(e) *Failure to Call a Witness.* The fact that a person was designated by a party pursuant to subdivision (a)(6)

or subdivision (b)(3) as an intended witness but was not called to testify shall not be commented upon at the trial by any party.

(f) *Protective Orders.* Upon motion and a sufficient showing the court may at any time order that the discovery or inspection sought pursuant to this rule be denied, restricted or deferred, or make such other order as is appropriate. In determining the motion, the court may consider, among other things, the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; and protection of confidential relationships and privileges recognized by law; the need to safeguard from loss or to preserve the condition of tangible objects sought to be discovered under paragraphs (a)(4), (a)(5), (b)(1) and (b)(2). The court may permit a party to make a showing of good cause, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court thereafter enters a protective order, the entire text of the party's statement shall be sealed and preserved in the records of the court, to be made available only to an appellate court in the event of an appeal. Upon application of a party who has, pursuant to subdivision (a)(6) or subdivision (b)(3), been requested to designate the names of persons who will be called as witnesses at the trial, the court may order that the testimony of one or more persons so designated be perpetuated by oral deposition pursuant to Rule 15 at a time and place and before an officer ordered by the court. Examination and cross-examination shall proceed as permitted at the trial. A

record of the testimony of such a witness shall be made and shall be admissible at the trial as part of the case of the party who requested the taking of the deposition in the event the witness becomes unavailable without fault of such party or if the witness changes his or her testimony materially.

(g) *Procedure and Timing.*

(1) *Defendant's Request.* A request by a defendant for discovery and inspection shall be made within twenty-one (21) days after arraignment. The attorney for the state shall respond in writing within fifteen (15) days after service of the request stating with respect to each item or category either that discovery and inspection will be permitted or stating that the request will not or cannot be complied with and the reason why. The response shall also specify the place and time defendant may inspect the items being made available.

(2) *State's Request.* Within twenty-one (21) days after serving a response to a defendant's request for discovery and inspection, the attorney for the State may serve a defendant with a request for discovery and inspection. The defendant shall respond within fifteen (15) days after service of the request stating with respect to each item or category either that discovery and inspection will be permitted or stating that the request will not or cannot be complied with and the reason why. The response shall also specify the place and time the attorney for the State may inspect the items being made available.

(3) *Discovery or Inspection Withheld.* In the event a party refuses to comply with a request for discovery or

inspection, the party who served the request may move for an order to compel compliance with his request.

(4) *Extensions of Time.* The court may on motion of a party and for good cause shown extend the time for serving requests or responses permitted or required under this rule.

(h) *Continuing Duty to Disclose.* If, subsequent to compliance with a request for discovery or with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under this rule, he or she shall promptly notify the other party of the existence thereof.

(i) *Failure to Comply.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to provide the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material which or testimony of a witness whose identity or statement were not disclosed, or it may enter such other order as it deems appropriate.

(j) *Applicability of Rule.* This rule applies only to criminal trials in the Superior Court.

APPENDIX G

TIME 1:40 P.M.

DATE June 9, 1986

PLACE Pawtucket Police Dep

I, Doris M. Palmieri, voluntarily, without threats or promises, make the following statements:

Q. What is your name?

A. Doris M. Palmieri

Q. What is your present address?

A. 502 Pawtucket Ave. Pawt. RI

Q. What is your date of birth?

A. 1/22/31

Q. What is your occupation?

A. homemaker

On Saturday night, 6/7/86, sometime after 10 PM, my boyfriend with I live, TEX, picked my sister and I up at a club in Providence, and we drove to Pawtucket Ave. Pawt. When we got into the apartment, Tex told me that I better not go to sleep there and that I should leave. Tex had been drinking heavily and appeared to be drunk, so when he said that to me, I didn't pay much attention to him. He's always talking like that, irrational, when he drinks.

I followed him downstairs and met the woman across the street. When I was talking to the woman, she asked me if I smelled something like a fire burning. Then we discovered that the apartment house was on fire.

My boyfriend TEX was in front and I asked him where he was going. He didn't answer me, but just got into his car and took off. He returned short time later and

I found him in the backyard of the apartment house that was on fire. I asked him what he was doing there, but he didn't answer me . . . he just got in his car again, and left the area.

Later on in the evening, they had him in the RESCUE truck and they were talking to him. Now when I think back, I think it is strange that he told me not to sleep in the apartment that night.

/s/ Miss Doris Palmieri
SIGNATURE

Statement taken by _____

Witnesses: _____

_____

APPENDIX H

EXHIBIT "B"

DIVISION OF FIRE SAFETY

LOGO

COMPLAINT # 2-2542

1. COMPLAINANT: LIEUTENANT
EDMOND H. FARRELL
PAWTUCKET FIRE DEPARTMENT

2. OWNER (S)	3. OCCUPANT (S)
COUTU, GERALD W. & MILDRED R. 5 MEADOW AVENUE JOHNSTON, RHODE ISLAND	OCCUPIED COMMERCIAL AND MULTI-FAMILY BUILDING 502-504 PAWTUCKET AVENUE PAWTUCKET, RHODE ISLAND

4. Type of Investigation	5. Location of Loss	6. Day and Date
Fire - Occupied Commercial and Residential Bldg.	502-504 Pawtucket Avenue Pawtucket, Rhode Island	Saturday, June 7, 1986 @ 11:34 P.M.

7. Narrative of Investigation:

Fire determined to be of incendiary origin caused extensive damage to this three-story brick commercial/residential building with basement, located in a densely populated residential neighborhood of moderately priced homes. The building is occupied by two stores and nine apartments.

Scene examination conducted by Investigator DONALD M. BYRNE and Lieut. FARRELL reflected fire originated in the basement, at the front stairway leading to the first floor. Fire extended from this area vertically and horizontally to the partitions of the first floor which housed a Beauty Salon and Laundromat. Both businesses received heavy damage; the remainder of the building received heavy smoke and water damage. No electric wires in immediate area of point of origin and no connection between point or area of origin and hot water heater or furnace in basement. All accidental causes eliminated.

Photographs taken by PAWTUCKET POLICE DEPARTMENT. Evidence seized and submitted for analysis to U.R.I. LABORATORIES.

Subject arrested and charged with ARSON 1st DEGREE. Case awaiting court action.

Insurance: CONROY & DALEY AGENCY, Providence, RI; CAMBRIDGE MUTUAL.

8. Origin	9. Status	10. Investigator	11. Date of Report
INCENDIARY	PENDING (Arrest Made)	GERALD A. LEDDY GL HS	JUNE 18, 1986

NOTIFICATION

At 12:30 A.M. on June 8, 1986 Lieutenant EDMOND H. FARRELL of the PAWTUCKET FIRE DEPARTMENT requested this office to investigate a fire that occurred in that city on June 7, 1986.

RESPONSE

Senior Investigator DONALD M. BYRNE arrived in Pawtucket at 1:00 A.M. on June 8, 1986 and met Lieutenant FARRELL at 502-504 Pawtucket Avenue (the fire scene).

FIRE DETAILS

On June 8, 1986 Lieutenant FARRELL advised Senior Investigator DONALD BYRNE that at 11:34 P.M. on June 7, 1986 an unknown male called Fire Headquarters to report a fire at 502-504 Pawtucket Avenue and that there was a dumpster fire reported at this address at 10:36 P.M. that same evening. Lieutenant FARRELL advised that upon entering the basement of this dwelling he observed that the fire appeared to have started under the stairs leading to the first floor. Lieutenant FARRELL advised that he inspected this area and could not find any accidental causes for this fire; therefore, he requested an investigation by this office.

Lieutenant FARRELL advised that the building is owned by Mr. and Mrs. GERALD COUTU of 5 Meadow Avenue, Johnston, Rhode Island who were notified by the Police Department and responded to the scene. There were no electric wires in the immediate area of the point of origin and no connection between the point or area of origin and the hot water heater or furnace in the basement.

Photographs were taken by the PAWTUCKET POLICE DEPARTMENT.

OWNER(S)

The building is owned by GERALD W. COUTU (D.O.B. 3-5-27) and his wife, MILDRED R. COUTU (D.O.B. 4-22-32), who reside at 5 Meadow Avenue, Johnston, Rhode Island. Mr. COUTU is retired and Mrs. COUTU is a homemaker. The COUTUS have owned this building for approximately two years.

OCCUPANT(S)

This building is occupied as a commercial and multi-family apartment dwelling, with two stores and nine apartments.

INSURANCE

CONROY & DALEY AGENCY, 15 Nassau Street, Providence, Rhode Island; CAMBRIDGE MUTUAL INSURANCE COMPANY.

STATEMENTS OF WITNESSES

On June 9, 1986 the following persons were interviewed at PAWTUCKET POLICE HEADQUARTERS by Detective Sergeant KENNETH RYAN of the PAWTUCKET POLICE DEPARTMENT and Senior Investigator DONALD BYRNE.

MR. GERALD COUTU (D.O.B. 3-5-27) of 5 Meadow Avenue, Johnston, Rhode Island advised that a Mr. THOMAS MIGUEL and his daughter told him that Mr. THOMAS BOLLING was responsible for setting this fire and that he

(MIGUEL) had personally stopped BOLLING from placing a burning grocery bag in an exhaust duct for the clothes dryer which is attached to the rear of the house at 502-504 Pawtucket Avenue at approximately 8:30 P.M. on June 7, 1986.

(Statement of GERALD COUTU is retained as part of this case record.)

THOMAS MIGUEL (D.O.B. 9-6-56) of 100 Trenton Street, Pawtucket, Rhode Island (502-504 Pawtucket Avenue) advised that on June 7, 1986 at approximately 9:15 P.M. he looked out his window and saw Mr. THOMAS BOLLING trying to stuff a brown paper bag that was on fire into a heater vent that was attached to the rear of the house. MIGUEL advised that he went outside and stopped Mr. BOLLING from starting a fire and asked Mr. BOLLING what he was doing. Mr. BOLLING stated to him that he was going to get the landlord back for what he was doing to him. Mr. MIGUEL advised that Mr. BOLLING further stated that he was "tired of these goddamn people raising my rent" and it "would be best if I take my family out of the apartment".

(Statement of THOMAS MIGUEL is retained as part of this case record.)

TAMMY L. MIGUEL (D.O.B. 9-12-74) of 100 Trenton Street, Pawtucket, Rhode Island gave the same information as her father; also that Mr. BOLLING told her, "I'll get this house on fire tonight".

(Statement of TAMMY L. MIGUEL is retained as part of this case record.)

DORIS M. PALMIERI (D.O.B. 1-22-31) of 502 Pawtucket Avenue, Pawtucket, Rhode Island (girl) friend of THOMAS-BOLLING) advised that on June 7, 1986 her boyfriend, "TEX" (Mr. BOLLING) was drinking heavily and appeared to be drunk. She advised that "TEX" told her that she should not sleep in the apartment and that she should leave.

(Statement of DORIS M. PALMIERI is retained as part of this record.)

JOSEPH CASALINO (D.O.B. 5-28-57) of 268 Fruit Hill Avenue, North Providence, Rhode Island, owner of FANTASIA HAIR DESIGN (one of the businesses damaged by this fire) stated that he responded to the fire scene and talked with a LOUIE DeMELLO and Mr. PETER BROWN. Mr. CASALINO advised that DeMELLO told him that he saw Mr. BOLLING'S car in front of his house at 96 Trenton Street (adjacent to the fire scene) with the lights on and motor running just before the fire started. BROWN stated to him that he saw Mr. BOLLING coming out of the cellar just prior to the fire starting.

(Statement of JOSEPH CASALINO is retained as part of this record.)

On June 10, 1986 Mrs. MILDRED R. COUTU (D.O.B. 4-22-32) of 5 Meadow Avenue, Johnston, Rhode Island was interviewed by this Investigator (GERALD A. LEDDY) at PAWTUCKET POLICE HEADQUARTERS. Mrs. COUTU advised that she was with her husband on Sunday, June 8, 1986 when TOM MIGUEL and his daughter told them that THOMAS BOLLING was responsible for this fire. Mrs. COUTU further advised that she

received a telephone call on June 7, 1986, at approximately 7:50 P.M., from Mr. THOMAS BOLLING and that he was complaining about the rent.

(Statement of MILDRED R. COUTU is retained as part of this record.)

MISCELLANEOUS

On June 8, 1986 PAWTUCKET POLICE went to PAWTUCKET MEMORIAL HOSPITAL to interview Mr. THOMAS BOLLING who had been taken there for smoke inhalation. At that time, Mr. BOLLING refused to give any statement.

On June 10, 1986 Mr. THOMAS BOLLING came into PAWTUCKET POLICE HEADQUARTERS and was given his Rights by Sergeant KENNETH RYAN. BOLLING refused to sign a Rights Form and refused to give any statement. BOLLING was arrested and charged with Arson 1st Degree. BOLLING was ordered held without bail, pending a psychiatric examination at the State INSTITUTE OF MENTAL HEALTH.

NOTE: It should be noted for the record that Mr. BOLLING has an extensive criminal record dating back to 1960 (Ref. copy of record retained in file).

CLASSIFICATION AND STATUS

This fire is classified as INCENDIARY, due to the fact that the point of origin has been determined to be the basement stairway where all accidental causes have been eliminated.

The status of this case is PENDING; awaiting court action.

/s/ Gerald A. Leddy
GERALD A. LEDDY
DEPUTY STATE
FIRE MARSHAL

GAL:mj

6/18/86

APPENDIX I

EXHIBIT D

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC		SUPERIOR COURT
STATE OF RHODE ISLAND	:	P1/86-2703A
VS.	:	
THOMAS P. BOWLING	:	

STATE'S REQUEST FOR DISCOVERY AND ALIBI

The State of Rhode Island by and through the Attorney General in accordance with Rule 16(b) and (c) of the Rules of Criminal Procedure of the Rhode Island Superior Court, having received a written request, by the defendant who seeks discovery under subdivision (a) of Rule 16, requests to inspect or listen to copy or photograph any of the following within the possession, custody or control of the defendant or his attorney:

1. All books, papers, documents, photographs, sound recordings or copies thereof, or tangible objects, buildings, or places which are intended for use by the defendant as evidence at the trial;

2. All results or reports in writing, or copies thereof, of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case and prepared by a person whom the defendant intends to call as a witness at the trial and, subject to an appropriate protective order under paragraph (f), any tangible objects still in existence that were the subject of such tests or experiments;

3. A written list of the names and addresses of all persons other than the defendant whom the defendant expects to call as witnesses at the trial in the event the State presents a prima facie case;

4. As to those persons other than the defendant whom the defendant expects to call as witnesses at the trial, all written or recorded verbatim statements, signed or unsigned, of such persons and, if no such statement of a witness is in the possession of the defendant, a summary of the testimony such person is expected to give at the trial;

5. A statement as to whether the defendant intends to rely on the defense of alibi, if the defendant does intend to so rely, furnish with specificity the place the defendant claims to have been at the time or times of the alleged offense and the names and addresses of all witnesses he intends to call at trial to establish such alibi.

The State furnishes the following particulars pursuant to Rule 16(c) *Superior Court Rules of Criminal Procedure:*

Date of Offense: June 7, 1986

Time of Offense: 2300 - 2400 hours.

Place of Offense: 502-504 Pawtucket Avenue

Pawtucket, Rhode Island

STATE OF RHODE ISLAND

By its attorney:

ARLENE VIOLET
ATTORNEY GENERAL

/s/ Charles M. Nystedt
Charles M. Nystedt
Assistant Attorney General
72 Pine Street
Providence, Rhode Island
02903

CERTIFICATION

I, the undersigned, do hereby certify that on this 26th day of November, 1986, I mailed a copy of the within State's Request for Discovery and Alibi to the attorney of record, Dale G. Anderson, Esquire, Public Defender's Office, 250 Benefit Street, Providence, Rhode Island 02903.

/s/ Illegible Kissh

APPENDIX J

EXHIBIT E

STATE OF RHODE ISLAND PROVIDENCE, SC.		SUPERIOR COURT
STATE OF RHODE ISLAND VS	:	P1/86-2703
THOMAS BOWLING	:	

DEFENDANT'S ANSWER TO STATE'S REQUEST FOR DISCOVERY

1. Street map, City of Providence.

2. Keeper of Records, Pawtucket Fire Department and/or investigator Gerald A. Leddy (see State's answer to discovery) that a dumpster fire was reported at 502-504 Pawtucket Avenue at 10:36 p.m., June 7, 1986; that the building fire was reported at 11:34 p.m.

3. Jennette Fagundes, 965 Chalkstone Avenue, Providence, RI, that she is the sister of Doris Palmieri, that she has known the defendant to have lived with her sister for many years and often visited them at their apartment on Pawtucket Avenue; that on the evening of June 7th, 1986 she and her sister were at the Lithuanian Club on Smith Street, Providence, RI along with her roommate Loretta Brady (now deceased); that sometime after 10:00 p.m. that evening her sister called the defendant to come pick her up; that the defendant came to the Lithuanian Club and picked up herself, her sister and her roommate, drove to her house at 965 Chalkstone Avenue, dropped off Loretta and herself and then left for home (Pawtucket Avenue) with Doris; that she visited Doris after the fire

and saw the condition of the apartment; that Doris died near the end of June, 1986; that she saw improvements the defendant had made in the apartment.

4. Angie Miguel, 269 Sayles Avenue, Pawtucket, RI, that when she left her apartment June 7, 1986 early in the evening her husband Thomas and her daughter Tammy were still there; that she went to Rides Grill, Pawtucket, that later that evening she learned of the fire by a telephone call, that she then went to her apartment building and saw the firefighters and saw her mother, Doris Palmieri sitting with another tenant across the street from the apartment building on the sidewalk.

THOMAS BOWLING
By his Attorney

/s/ Dale Anderson
Dale G. Anderson
Assistant Public Defender

CERTIFICATION

I hereby certify that on September 26, 1988, I delivered a copy of the within Motion to the Department of Attorney General, Providence, Rhode Island.

/s/ Dale Anderson

ORIGINAL

No. 93-839 (2)

Supreme Court, U.S.
FILED
FEB 15 1994
OFFICE OF THE CLERK

DISTRIBUTED

FEB 22 1994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

GEORGE VOSE, DIRECTOR,
DEPARTMENT OF CORRECTIONS,
Petitioner

v.

THOMAS P. BOWLING,

Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION

RALPH J. PERROTTA
171 Congdon Street
Providence, R.I. 02906
401-861-3856

Counsel for Respondent

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42 pp

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD REVIEW A CASE AT A STAGE WHEN SUCH REVIEW WILL NOT RULE OUT A SUBSEQUENT PETITION IN THE SAME CASE AND DENIAL OF THE PETITION WILL PRECLUDE MULTIPLE REVIEWS.

II. WHETHER IT IS PROPER TO DENY A DEFENDANT THE RIGHT TO CALL AN ALIBI WITNESS ABSENT A FINDING OF WILLFUL MISCONDUCT.

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OPINIONS BELOW

Petitioner seeks review of Bowling v. Vose, 3 F.3d 559 (1st Cir. 1993). In that case the First Circuit of Appeals reversed the decision of the United States District Court for the District of Rhode Island, Bowling v. Vose, Civ. No. 91-0472, slip op. (D.R.I. Nov. 13, 1992), denying respondent's petition for a writ of habeas corpus. Respondent, defendant Thomas Bowling, sought relief from the decision of the Rhode Island Supreme Court, State v. Thomas P. Bowling, 585 A.2d 1181 (R.I. 1992).

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. §§ 1254, 1257 and 2254 and Sup. Ct. R. 10(a) and 10(c). Respondent contests the appropriateness of the exercise of this Court's jurisdiction under Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On January 19, 1989, after a jury trial in the Providence County Superior Court in which he was convicted of first-degree arson, respondent Thomas Bowling was sentenced to fifteen years in prison.

Bowling appealed to the Rhode Island Supreme Court, claiming, inter alia, that the trial judge's exclusion of a proffered alibi witness deprived him of his right to present a defense under the Sixth Amendment to the United States Constitution. That appeal was denied on January 31, 1991. State v. Thomas P. Bowling, 585 A.2d 1181 (R.I. 191).

Bowling filed a petition for a writ of certiorari in this Court on May 1, 1991, which petition was denied on June 10, 1991. He thereupon filed, in September, 1991, a petition for a writ of habeas corpus in the United States District Court for the District of Rhode Island, which petition was denied on November 13, 1992. Bowling v. Vose, Civ. No. 91-0472, slip op. (D.R.I. Nov. 13, 1992).

On November 18, 1992, Bowling appealed the District Court's ruling to the United States Court of Appeals for the First Circuit. In an opinion by Circuit Judge Torruella dated September 10, 1993, Bowling v. Vose, 3 F.3rd 559 (1st Cir. 1993), a three-judge panel of the Court of Appeals held unanimously that the trial judge's refusal to allow Bowling to present an alibi witness did violate his Sixth Amendment rights, but remanded the case to the United States District

Court for a determination as to whether that violation was sufficiently prejudicial to warrant habeas relief, a test which the court analogized to the federal harmless-error rule. The State of Rhode Island's petition for rehearing was denied on October 20, 1993, after which the State obtained a stay of the Court of Appeals mandate and petitioned this Court for a writ of certiorari.

STATEMENT OF FACTS

Late on Saturday evening, June 7, 1986, the Pawtucket, Rhode Island, fire department was called to a fire at 502-504 Pawtucket Avenue. Shortly thereafter, Thomas Bowling was arrested, charged with first-degree arson and indicted.

Bowling's counsel filed a request for discovery, which entitled the State to file a reciprocal request for discovery and notice of alibi. It did so and, with respect to the issue of a possible alibi, provided the following particulars, as it was required to do:

Date of offense: June 7, 1986

Time of offense: 2300-2400 hours

Place of offense: 502-504 Pawtucket Avenue, RI

At trial, the State's posture vis a vis the time of the offense was consistent with its pretrial notice to Bowling. During voir dire the prosecutor stated that "at approximately 1:00 to 1:30 p.m. (sic - presumably she said or intended to say, and was understood to mean, 11:00 to

11:30) ... this defendant did commit the crime as charged...." Trial Transcript, p. 8 (hereinafter "T. Tr."); in her opening statement the prosecutor said the fire "took place ... at approximately 11:30, 11:45 that night." T. Tr., 21. One of the State's witnesses, Investigator Donald M. Byrne, testified on direct that the fire had been discovered at 11:46 P. M.

Up to that point -- i.e., through the direct testimony of Investigator Byrne -- neither the prosecution nor the defense had reason to concern themselves with the whereabouts of Bowling before 11:00 P.M. On cross examination, however, Investigator Byrne testified that his observations of the fire's travel from the basement staircase, coupled with his determination that while the fire had been set, the arsonist had not used any accelarant or flammable material, led him to conclude that the fire had been burning from one-half to three-quarters of an hour before it was discovered. T. Tr., 61, 72; Exhibit B. If Byrne's testimony that the fire was discovered at about 11:46 P.M. was to be believed, that would place the start time at 11:01 P.M., still within the parameters of the notice the State provided the defense in its request to be notified of any alibi defense.

The Fire Marshal's Report, however, Exhibit B, which the Court of Appeals concluded "would seem to be the most definitive evidence" of when the fire was reported, Bowling v. Vose, 3 F.3rd 559 (1st Cir. 1993), at 560, note 2,

stated the fire was reported by "an unknown male" at 11:34 P.M. One-half to three-quarters of an hour before 11:34 P.M. would make the crucial time, insofar as a potential alibi defense was concerned, from 10:49 to 11:04 P.M., a much smaller and earlier window of opportunity than the 11:00 P.M. to 12:00 M. time-frame provided by the State to the defense and articulated by the prosecutor and the State's witnesses during trial.

In the light of this new time-frame, a statement taken from a Doris Palmieri, Bowling's common-law wife, considered together with the testimony of a Peter Brown, a State witness who had placed Bowling at the scene of the fire at 10:34 P.M., which time was precisely established, coincidentally, by an unrelated fire in a dumpster in the vicinity reported at that time, took on new significance. Ms. Palmieri, who had since died (of causes unrelated to the fire), had told the police that she and her sister, unidentified by name, had been picked up in Providence by Bowling and taken back to the scene of the fire, which was her home, arriving shortly after it was discovered. That meant that sometime after 10:34 P.M. Bowling left Pawtucket and drove to Providence to pick up Palmieri and her sister and then drove back to Pawtucket, a feat which, under the most optimistic projection of how much time such a trip would require, would have put him close to the 11:04 P.M. parameter of the new time-frame.

Bowling's counsel identified Ms. Palmieri's sister as

one Jeannette Fagundes, located her and interviewed her. She revealed that Bowling's excursion was even longer than Palmieri's statement indicated: Bowling had not taken her and Ms. Palmieri directly back to Palmieri's home in Pawtucket (the scene of the fire), she said, but rather had first dropped off Ms. Fagundes and a roommate at their home at a different address in Providence. Exhibit E. As a result, he was prepared to argue, even if Bowling left Pawtucket precisely at 10:34, when he was placed there by Brown, he could not have arived back at the scene of the fire during the time it was started: 10:49 P.M. to 11:04 P.M.

Bowling's counsel thereupon filed an answer to the State's request for alibi, identifying Ms. Fagundes as an alibi witness and representing to the court that, in the light of the profferred testimony, "The prudent conclusion was that ... [Bowling] was absent from the scene from about 10:45 till about 11:30." Exhibit E; T. Tr., 233-6. The prosecutor objected to the proposed testimony, claiming that the defendant "concocted some other story to put some witness here at the eleventh hour," that the admission of the proposed testimony would leave "a gaping hole" in the prosecution's case and that the defendant had not complied with the rule requiring him to respond to the State's request for notification of intent to rely on an alibi defense within 21 days after receipt of discovery from the State as required by the State's discovery rules.

Alternatively, the prosecutor stated she would withdraw her objection to the testimony of Ms. Fagundes if she were allowed to introduce the statement of the then-deceased Ms. Palmieri in rebuttal. T. Tr., 240-1.

The trial judge, stating that Ms. Palmieri's statement was sufficient to suggest to the defense that it might have an alibi witness, whether or not the identity of that witness was known, and that the defense should have so informed the State, excluded the proffered testimony, concluding it was "the only reasonable sanction." T. Tr., 248. The defendant, he said, "seized upon this tact (sic) having heard the state's entire case and the state had rested." T. Tr., 247. He did not address the issue of the new, earlier and smaller time-frame.

Bowling's appeal to the Rhode Island Supreme Court was denied, the court agreeing with the trial judge that Bowling was dilatory in notifying the State of his alibi defense. That court also ignored the issue of the new time-frame revealed by the cross-examination of Byrne, simply referring to Byrne's testimony on direct that the fire was discovered at 11:46 P.M. and started thirty to forty-five minutes before that.

At the hearing in the United States District Court on Bowling's habeas petition, his counsel testified that he did not know his client had an alibi defense until after Byrne testified, that he was surprised by Byrne's testimony that the fire had started from one-half to three-quarters of an

hour before it was discovered, that he did not speak to Ms. Fagundes until after the State rested and that he did not willfully conceal alibi evidence. Transcript of Hearing on Habeas Petition in the Federal District Court for the District of Rhode Island, February 20, 1992, pp. 11-12, hereinafter "H. Tr." The District Court Judge nevertheless denied Bowling's petition, concluding that the case "fits neatly into the requirements of Taylor v. Illinois [400 U.S. 484 (1988)]." The United States Court of Appeals for the First Circuit disagreed, finding that the trial judge's refusal to allow Bowling to present an alibi witness did violate his Sixth Amendment rights, but remanded the case to the United States District Court for a determination as to whether that violation was sufficiently prejudicial to warrant habeas relief. Rather than face the harmless error issue, the State petitioned this Court for a writ of certiorari.

I. THIS COURT SHOULD DECLINE TO REVIEW BOWLING BECAUSE THERE ARE NO "SPECIAL AND IMPORTANT REASONS" TO DO SO AND REVIEW AT THIS STAGE WILL NOT RULE OUT A SUBSEQUENT PETITION IN THE SAME CASE; DENIAL OF THE PETITION, ON THE OTHER HAND, WILL PRECLUDE MULTIPLE REVIEWS.

Although petitioner argues at length its disagreement with the First Circuit Court of Appeals resolution of the chief substantive issue raised by this case -- i.e., whether the trial judge's refusal to allow Mr. Bowling to call an

alibi witness was, under the facts and circumstances of his trial, a constitutionally justifiable sanction -- it does not address that court's ruling, citing Brecht v. Akmanson, ____ U.S. ____, ____, 113 S. Ct. 1710, 1714 (1993), that the case be remanded to the district court for a determination as to whether that error "had substantial or injurious effect or influence in determining the jury's verdict."

In its preamble to Sup. Ct. Rule 10, "Considerations Governing Review on Writ of Certiorari," this Court makes it clear that review on writ of certiorari "is not a matter of right, but of judicial discretion. A petition ... will be granted only when there are special and important reasons therefor." Petitioner cites no reasons at all why this Court ought to review this case, let alone "special and important reasons," it merely cites subsections (a) and (c) of that rule. A careful reading of those subsections, however, in the light of the decision of the court of appeals, makes clear that certiorari is inappropriate, unnecessary and a potentially wasteful use of this Court's limited resources:

> "(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of this

Court's power of supervision.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. (Emphasis added.)

The words "decision" and "decided" are emphasized because the they make it clear that, in the main, conflicts in decisions -- i.e., final resolutions of real disputes between parties -- warrant this Court's time and attention; court pronouncements not rising to that level of conclusiveness and finality do not. In this case, while the court of appeals concluded that the trial judge's refusal to allow Bowling to call his alibi witness deprived him of his rights under the Sixth Amendment, it also remanded the case to the district court for a determination as to whether that error was sufficiently prejudicial to warrant habeas relief.

Both issues -- whether Bowling was deprived of his constitutional rights under the Sixth Amendment and, if so, whether that denial was sufficiently prejudicial to warrant reversal of his conviction -- are peculiarly fact-intensive and fact-driven. As can be seen from a reading of the Statement of Facts, supra, the two Rhode Island Courts and the two federal courts hearing this case are not in agreement about those facts; an inquiry into the issue of prejudice, requiring as it would an inquiry into all the

evidence, may well resolve some of those differences. Three possibilities suggest themselves: this Court denies the petition; this Court grants the petition and rules in favor of the State; this Court grants the petition and rules in favor of Bowling.

* If the petition is denied and the district court concludes the error was not so prejudicial, the State's conviction would be reinstated; while Bowling might still petition this Court for review at that stage, his posture would make it difficult for him to mount a convincing case for certiorari, the question of whether the error was sufficiently prejudicial being so fact-laden as to call for great deference to the district court. In any case, this Court would review the case once, rather than twice.

* If the petition is denied and the district court concludes the error was sufficiently prejudicial to warrant reversal, the State would then be in a position to petition this Court for a writ of certiorari in the light of an extended analysis of all of the evidence, for and against conviction, which analysis would likely facilitate a determination by this Court as to whether or not Taylor v. Illinois, supra, requires reversal. Again, this Court would hear the case once.

* If the petition is granted and this Court decides, in spite of the disagreements concerning the factual backdrop against which the alibi witness was prevented from testifying, that Taylor requires reversal, the case would,

presumably, still have to be remanded for a determination of the question of prejudice. After that determination is made, the case could well present itself to this Court for further review. This Court could find itself hearing the case a second time.

* If the petition is granted and this Court decides, in spite of the disagreements concerning the factual backdrop against which the alibi witness was prevented from testifying, that Bowling was not denied his constitutional rights, the case will be over.

In short, while granting the petition allows for the possibility that, in spite of the factual disagreements among the lower courts, this Court might nevertheless dispose of the case once and for all, it also may require this Court to hear the case a second time. Since the facts will likely have been more fully explored by the time the case presents itself to this Court for a second review, the Court may well find itself revisiting its earlier judgment. On the other hand, denial of the petition insures that this Court will not have to review the case more than once, and that its one review will be conducted in the light of the final and most complete analysis of the facts.

It is respectfully suggested that there are no "special and important reasons," in the parlance of Rule 10, for this Court to review this case before both the Taylor issue and the question of prejudice are decided below.

II. IF THIS COURT DECIDES TO REVIEW BOWLING IT SHOULD

UPHOLD THE COURT OF APPEALS APPLICATION OF TAYLOR TO THE FACTS OF THIS CASE.

A. THE CRUX OF THE STATE'S ARGUMENT WITH BOWLING IS THAT THE COURT OF APPEALS DISREGARDED HISTORICAL FACTS FOUND BY THE STATE COURT

The State's brief makes three arguments: (1) that the First Circuit Court of Appeals, by finding that Bowling could not have anticipated the proffered alibi testimony during the time within which the State's discovery rules required him to notify the prosecution of his intent to call an alibi witness, disregarded a finding of historical fact made by the State court; (2) that it mis-applied Taylor; and, (3) that it ignored state rules of criminal procedure.

A synopsis of the latter two arguments, however, reveals that they are premised on, and largely variations of, the first argument. The State's argument numbered "II" begins by summarizing a defendant's rights under the Sixth Amendment (pp. 17-18), points out that alibi notice rules do not violate those rights (pp. 18), discusses Taylor (pp. 18-19), and reiterates the State's complaint with what it calls the Court of Appeals "transformation of ... [the] facts as they were found below." (P. 20.) It then cites and discusses Miller v. Fenton, 474 U.S. 104 (1985), for what it teaches on the issue of the appropriate role of state and federal courts "on such matters of historical fact as the length of the interrogation and the defendant's

familiarity with Miranda warnings ...." (P. 21.) Finally, the argument concludes with another extended analysis of the differing views of the State courts and the court of appeals on "the facts." (Pp. 21-24.)

The State's argument numbered "III," ostensibly about the State's discovery rules, begins by describing those rules, emphasizing the liberality with which they were fashioned and have been interpreted (pp. 24-27), but concludes with another explication of the State's view as to what it asserts are the historical facts deserving of the deference of the court of appeals. E.g., according to the State, "[t]he record reveals that when viewed in its proper context, the fire inspector's opinion indicated his belief that the fire began after 11:00 p.m., the time provided in the State's request for alibi" (p. 27); whatever prejudice the defendant suffered by virtue of the alibi witness's exclusion was "self-inflicted" (p. 28.); the defendant, quoting the State court, "seized upon this [alibi] having heard the state's entire case and [after] the state had rested" (p. 28, State v. Bowling, 585 A.2d at 1184); and, again quoting the State court, "the defendant employed a last minute switch in tactics" (p. 28; 585 A.2d at 1185).

B. THE COURT OF APPEALS DID NOT DISREGARD FINDINGS OF HISTORICAL FACT MADE BY THE STATE COURTS

The State cites Burden v. Zant, 498 U.S. 433 (1991), and Demosthenes v. Baal, 495 U.S. 731 (1990) (pp. 14-15),

for the proposition that state courts are entitled to deference by the federal courts in their determination of historical facts. In Burden the court of appeals reversed a clearcut finding by the state court that a witness had been granted immunity; in Demosthenes a state court determination that the defendant had intelligently waived his right to pursue post-conviction relief was overturned. The Court of Appeals disagreement with the State courts regarding the various conclusory findings described in II. A, supra, overturned no such concrete finding of fact; rather, it was a result of an analysis of the undisputed historical facts in the light of the teachings of Taylor.

The only other "historical fact" cited by the State as purportedly disregarded by the Court of Appeals was that court's finding that "the trial court not only failed to make any explicit finding of willful misconduct, it seemingly concluded to the contrary." (P. 16.) In support of that proposition the State cites the very same Rhode Island Supreme Court findings discussed above, to wit, that Bowling "seized upon this [alibi] having heard the state's entire case and [after] the state had rested," that Bowling "employed a last minute switch in tactics during the course of his trial," and that any resultant prejudice resulting from his inability to call his alibi witness "was largely self-inflicted." (P. 17.)

But a close reading of these findings demonstrates how far short they fall -- even if they are assumed to be

correct -- of the necessary finding of willful misconduct. Of course Bowling seized upon his new-found alibi defense after having heard the state's entire case and after the state had rested; that mere statement of what happened is far from a finding of misconduct. On the contrary, if one takes the same view of the evidence as did the Court of Appeals, Bowling was entitled to do just that. The accusation of a last-minute switch in tactics is just another way of putting the same complaint -- and equally neutral in its implications: Why not switch tactics if the unanticipated testimony of one of the State's witnesses, Byrne, when viewed in the light of a document already in evidence, the Fire Marshal's report, suggests the defendant may have an alibi? Bowling's counsel would be derelict if he failed to do so.

The finding that the prejudice resulting from the inability to call the witness was self-inflicted is not neutral; it clearly assigns responsibility for his predicament to Bowling and his counsel. But it also falls far short of a finding of willful misconduct. The mere fact that the trial judge said he was "not persuaded that [offering an alibi witness] was the defendant's original intention....," as the Court of Appeals properly pointed out, "would not be indicative of bad faith or misconduct." 3 F.3d at 565, n. 6.

The only relevant fact which would properly be termed an "historical fact" within the meaning of Burden and

Demosthenes is the time, never determined, that the fire started. The State argues that the Rhode Island Supreme Court "noted in its opinion" -- which is far short of a finding of fact, historical or otherwise -- that Byrne's testimony itself placed the start of the fire in the 11:00 P.M. to 12:00 M. time frame Bowling was notified of in the discovery material provided him by the State. (P. 15.) The Court of Appeals, it contends, "mischaracterizes" the testimony of Byrne by taking it out of the context in which it was related. "[T]he inspector's testimony," the State continues, "when viewed in its proper context, did not place the starting time of the fire outside the time frame specified by the alibi request.... Never, at any point during his trial, was ... [Bowling] confronted with evidence which exceeded that time frame." (P. 16.) But that argument simply ignores the inconvenient existence of the Fire Marshal's report which, as we have seen, and as the Court of Appeals recognized, read together with Byrne's testimony regarding how long before discovery the fire was likely to have been started, is precisely such evidence, and Bowling's counsel understood it to be such.

Although concluding that the start time in the Fire Marshal's report was more definitive on the issue than Byrne's opinion, the Court of Appeals made no finding as to when the fire started either. Instead, it made clear, 3 F.3d at 560-561, n. 2, that it considered important neither its own nor the State court's view on that question but

rather the fact that, since the fire could have been reported either at 11:46 or at 11:34, and "... [Byrne's] testimony is reasonably open to the interpretation that the fire had been started thirty to forty-five minutes before it was actually discovered" (emphasis added), Bowling's counsel, combining that new information with the earlier starting time in the Fire Marshal's report, had "a new defense." 3 F.3rd at 561. The Court of Appeals properly concluded that Bowling could not have anticipated this "new defense" until he heard Inspector Byrne testify.

C. THE COURT OF APPEALS CORRECTLY APPLIED TAYLOR

Failing to convince the Court of Appeals that the State court's conclusory and equivocal findings were tantamount to findings of willful misconduct on the part of Bowling and/or his counsel, the State argues (p. 23), "[a]lternatively, the lack of any finding of deliberate misconduct on the part of defense counsel does nothing to buttress the Court of Appeals' holding," citing this Court's rejection, in Taylor, of the argument that a defense counsel's lack of candor should not be imputed to his client.

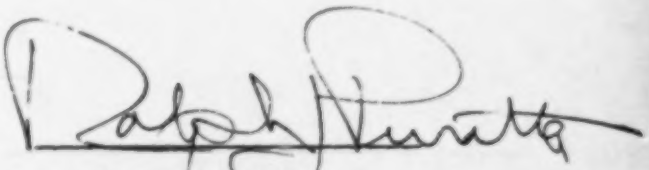
But this Court said clearly in Taylor that its holding therein was limited to "the specific facts of this case," 484 U.S. at 402, that "the case fits into the category of willful misconduct in which the severest sanction is appropriate" -- pointing out, further, that the trial judge suspected that testimony was being fabricated -- and that

"... alternative sanctions [to exclusion] are adequate in most cases...." Some examples of misconduct that may warrant exclusion, according to the Court, are fabricated excuses, dishonest clients, over-zealous defense counsel and evidence of a pattern of discovery violations. 484 U.S. at 413-14, 417. None of these have been suggested to be present in this case either by the State court or the State's brief. The State's suggestion that there was a lack of candor in the instant case, and that it rose to the level of willful misconduct, is simply a restatement of its other claims in different garb.

CONCLUSION

The State of Rhode Island's petition for a writ of certiorari should be denied; if this Court grants the petition, however, the decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,



RALPH J. PERROTTA
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APPENDIX

EXCERPTS FROM TRIAL TRANSCRIPT

real reason and not one of those frivolous reasons that I defined for you, what I define as frivolous, so please keep that in mind.

I will now ask Miss Mancuso to give you the date and time and place of the incidents out of which the charge against Mr. Bowling arose and to read you a list of prospective witnesses who may testify.

MISS MANCUSO: May it please the Court, ladies and gentlemen, the State alleges on June 7, 1986, at approximately 1:00 to 1:30 p.m., at 504 Pawtucket Avenue, this defendant did commit the crime as charged, as the Judge read in the indictment, that's in the City of Pawtucket.

The names you will hear associated with this case are not necessarily witnesses. First one woman who is deceased, Doris Palmieri; Peter Brown; Mildred and Gerald Coutu; Tammy Miguel; Thomas Miguel; Joseph Casalino; Sergeant Kenneth Ryan of the Pawtucket Police Department; retired Lieutenant Edmund Farrell of the Pawtucket Police Department; Fire Fighter Doire; Mr. Louis DeMelo; and from the Fire Marshal's office, Mr. Donald Byrne.

THE COURT: Thank you, very much. Do any of you ladies and gentlemen know any of the witnesses just mentioned and/or the defendant that has just been

circumstantial case for the fire at 504 Pawtucket Avenue. Mr. Thomas Miguel will take that witness stand, and he will tell you his relationship to the defendant, that at one point in time his now late mother-in-law was dating and living in common law as the wife of this defendant; hence, it was his father-in-law, so to speak, and he will tell you how earlier that afternoon or earlier that evening he saw this defendant start a fire in the dumpster in the back yard, and he stopped him. He went downstairs and he assisted him, and he said something to the effect of, "What the hell are you doing?" And you will hear Mr. Bowling's response, and you will hear why earlier that evening he tried to set a fire in the dumpster and was stopped. You will hear also the other actions of Mr. Bowling that evening, and then you will hear about the fire that took place later on that evening, at approximately 11:30, 11:45 that night.

Ladies and gentlemen, you will also hear from Tammy Miguel. Now, Miss Miguel is about 17 years old now. She will tell you that she still sees her grandfather, so she calls him, and she will tell you at one point in time how she told of conversations she had with this defendant regarding how he set the fire, or why he did.

Then Mr. or Mrs. Coutu will testify, and they will

MR. ANDERSON: Riser?

A (Continuing) The riser. Thank you, very much. The riser is burned right through.

Q And is that on the second and third step in that area?

A Yes.

Q Now, did you also check for any kind of incendiary devices?

A Yes.

Q Now, describe to the jury what an incendiary device is.

A Well, there's so many. It could be something as simple as a candle that's set in paper so after it burns down, a half hour later it burns down, it catches the paper on fire. There are hundreds of different devices that can be used. I never found anything like that. What we do automatically in anything other than an accidental fire is we take evidence from the area. In this case I took two cans of debris right from this area, put it in -- these are clean cans that have never been used for anything else, and we mark them a..d send them down to URI to be analyzed, the purpose of that being if there's any -- if they find any flammable, gasoline or thinner or anything like that.

Q Did they find any gasoline or thinner or anything like that in this case?

A No, they found nothing, no.

Q Is it fair to say in some fires that you investigated, when you respond, you can smell gasoline or you can smell some kind of flammable accelerant?

A Yes, you can.

Q And in this case I assume you sniffed to see if you could smell such a thing?

A That's correct.

Q Did you smell any?

A No.

Q And indeed the report that was returned to you from the laboratory was that upon their analysis no flammable, no flammables were discovered in the debris that you sent?

A Yes.

Q Aside from the investigation that you did that evening and which you have described in court, did you follow up on this or did someone else?

A I originally followed up. I was part of a few interviews, but I had to leave on I believe the 10th of that month for California, so I turned the case over to an investigator who works with me, Gerald Leddy, L-E-D-D-Y.

MR. ANDERSON: Thank you. Nothing further.

MISS MANCUSO: May I?

THE COURT: Yes.

REDIRECT EXAMINATION BY MISS MANCUSO:

Doris Palmieri indicated when she was picked up from the Lithuanian Club, that was when, I guess, the defendant told them not to sleep in the building. Did I read that correctly?

MR. ANDERSON: Your Honor, what I intended to focus on in this argument was that on June 9th, at the Pawtucket Police Department, Doris Palmieri told the Pawtucket police that on the night in question after 10:00 p.m. she was at, quote, a club in Providence with her sister and that the defendant, quote, picked up my sister and I at the club.

Now, what I find significant, Your Honor, is that whoever took this statement, I don't have a witness, from the police department, apparently did not ask her, "Where is this club in Providence? Who is your sister, what is her name?" and what happened to the sister. Had those questions been asked, the police, I contend, would have learned her sister's name is Jeannette Fagundes. "When Mr. Bowling picked us up at the club, he dropped my sister, Mrs. Fagundes, off at her apartment." They would have learned that that apartment is just west of River Street on Chalkstone Avenue, and they would then have known that this defendant couldn't have set that fire, Your Honor. I contend that this document and this witness, now that the State has notice of Jeannette

Fagundes, is exculpatory evidence. If I don't put it in, they're obliged to put it in. This proves this man didn't set that fire.

THE COURT: It doesn't prove anything the way it stands right now, Mr. Anderson; it doesn't prove anything.

MR. ANDERSON: It proves after the dumpster fire, which is already in evidence, Fire Fighter Doire stated that fire came in about an hour before the main building fire. We know the main building fire was reported around 11:30. Mr. Doire -- witness Peter Brown testified that Mr. Bowling was present when the fire department responded to the dumpster fire at about 10:30. The police knew that; Mr. Brown reported that to them back in June.

The police next know from eyewitness testimony that the defendant was present at about 11:30 when the fire is raging out of control. Had the police discovered the name and circumstances of the episode concerning Doris Palmieri and her sister, Jeannette Fagundes, they would have realized that it would require a good 15 minutes to travel from Pawtucket Avenue, somewhere a few blocks off of North Main Street, all the way across town to Smith Street to the bar, then down and up Chalkstone Avenue past River Street to drop the sister off, then travel

back with Doris to the apartment, meaning that he was absent for at least -- I would say the prudent conclusion was he was absent from the scene from about 10:45 till about 11:30.

Now, there is nothing in the State's discovery that indicates that the police or the fire fighters ever bothered to think and to notice exactly when this fire began. The State's answer --

THE COURT: Which fire?

MR. ANDERSON: The main fire. The State's answer, request for alibi, as I just noticed this morning, states as a time period twenty-three hundred-twenty-four hundred hours, meaning eleven to twelve p.m. I take it that means, if it were thought through, but I doubt that it was, that they conclude therefore the fire began sometime during that hour. We now know with a little more specific evidence from Inspector Byrne in his opinion the fire started approximately one half hour before the report came in, in other words, about eleven o'clock. This is stuff that is exculpatory that is now in the possession of the State. I don't think it can be constitutionally kept out, and so far as the Rules of Discovery goes, I could have filed an answer and said, "Not at this time, not at this time," and that was my position. I did not -- if necessary, I will take an

THE COURT: No, you ought to let him put it in, and if you don't let him put it in, you ought to put it in yourself. I think that's what he said.

MISS MANCUSO: If that's what he said, that's fine, but I don't think that's my obligation, Judge, to be on the eleventh hour sitting here with evidence that he's developed over the weekend. That's not what the rules say, that's not what the Supreme Court of the United States says, and most importantly, that's not what Doris Palmieri said. That's the crucial thing here. Read Doris Palmieri's statement. She's back at the scene of the crime when she is told by the defendant.

Now, if we want to put in evidence here, then let his Miss Fagundes testify and let her take the stand, and let us put in Miss Palmieri's statement. We're in a position where Mrs. Palmieri is deceased, and now over the weekend the defense comes up with the sister, and now the sister is going to testify and leave, I suggest to the Court, a hole in the State's case. Back when the fire was investigated, Miss Palmieri was alive, there was no reason to talk to the sister. So it's not exculpatory; there's nothing exculpatory about it. The police weren't negligent in investigating. It's just that now Mrs. Palmieri can't take the witness stand and tell the truth so the defendant concocted some other

story to put some witness here at the eleventh hour, and that's not fair, that's not what the rules say, and that's not what the Supreme Court of the United States says. I can't call Doris Palmieri like the Pawtucket police could speak with her back at the time of the crime. It's no alibi, the State would argue, as you take a reading of the statement, but if Mr. Anderson is going to let me put Doris Palmieri's statement in in full to rebut that, I have no objection to Miss Fagundes testifying.

THE COURT: I am toying with letting you reopen to put that statement in. I think it's a perfectly proper thing to do under our new Rules of Evidence and I think even under the old rules.

MISS MANCUSO: Well, I think certainly if you allow Jeannette Fagundes --

THE COURT: I haven't decided yet.

MISS MANCUSO: First of all, on the objection for the discovery, if you overrule it and it goes to the substantive question, there's a gaping hole here, and there's no question it's not the State's contention he didn't leave the scene at some time and come back again, but it's different --

THE COURT: Putting that argument aside, what's relevant here is what the facts are and what inferences

of one Doris Palmieri dated June 9, 1986 wherein she recounts, among other things, of having been picked up by the defendant together with her sister on the night of the fire. The sister is the proposed witness Fagundes.

If the defendant were serious about using Fagundes as an alibi, it seems reasonable to assume he would have identified her to defense counsel, and defense counsel's argument that her identity has just come to his attention avails the defendant nothing, especially since the State has rested having presented evidence in this admittedly circumstantial evidence case without notice and concern that defendant had even the possibility of an alibi defense. This possibility was raised by the Palmieri statement, and the Court is of the opinion that defendant, if he had any intention of relying on alibi defense, he had the obligation to inform the State of that intention even if the identity and/or the whereabouts of the witness was unknown. Frankly, the Court is not persuaded that such was the defendant's original intention but rather he seized upon this fact having heard the State's entire case and the State had rested.

I would point out that if the defendant were to be allowed to present the testimony of Fagundes, the Court

would almost certainly allow rebuttal evidence as the only fair thing to do, among which would be the statement of Palmieri, since deceased, which contains other evidence prejudicial to this defendant.

It is a given that the promulgation of Rule 16 is one of the most liberal discovery mechanisms in the nation. It is designed to permit a defendant to acquire all relevant information to be relied upon by the State to support the accusation so that an adequate defense may be prepared by the defendant in accordance with his due process rights. The rule, however, is not a one-way street because once a defendant has availed himself of its provisions, the State is accorded the reciprocal right to discovery, specifically including possible alibi information within the prescribed time limits. Failure by either the defendant or State to comply, gives rise to the alternative sanctions listed above.

In this case to allow the evidence sought to be presented, though late, and grant a continuance to the State to meet it, is not a reasonable alternative because the State has rested, a key factor in this Court's decision. One must remember that the Court is also responsible to ensure the orderly administration of justice. Therefore, the only reasonable sanction is the refusal to allow the testimony into evidence.

EXCERPTS FROM HEARING TRANSCRIPT

rested?

A I did not know the name of the witness until I, until Mr. Bowling told me the name, which was after the state rested, shortly after the state rested Friday morning. This was Friday afternoon, I believe.

Q Did you know that you had an alibi from Mr. Bowling at the time the fire started until after the Fire Marshal testified, or even a possible alibi?

A No.

Q After he testified?

A Still no, because I didn't. I knew Doris Palmieri was deceased. I didn't know the location of that club. I didn't know the time frames involved. No, I didn't.

Q When did you know?

A When I knew? When I met with Janet Fernandes.

Q Okay, and why didn't you inform the state of this possible witness until after the state rested?

A Well, I didn't know of the witness until Mr. Bowling told me. The Fire Marshal testified, I believe, on Wednesday. It is true I didn't run to my client and ask him about this until Friday. There was a lot of other evidence in the case, witnesses, two alleged admissions he had made, and I was just busy with that.

Q Did you ever ask Mr. Bowling before that Friday the

name of this sister?

A No, I didn't.

Q Had you ever spoken to Fagundes before that Friday?

A No.

Q Did you consider calling any witnesses before the trial began?

A No.

Q Did you consider the fact that the fire may have started before it was discovered?

A No, I, I was not thinking in those terms.

Q Why not?

A I was actually surprised by their answers. All the evidence seemed to indicate that he was there when the fire started. That was a common sense reading of the witness statements.

Q Who decided to use this alibi defense, you or Mr. Bowling?

A That was my decision entirely.

Q You never asked Fagundes' name before Friday; did you willfully attempt to conceal alibi evidence to prejudice the state?

A No.

MS. HARDIMAN: That's all I have.

CROSS-EXAMINATION BY MR. GORHAM:

MR. GORHAM: Walter Gorham for the State of

EXHIBITS

EXHIBIT "B"

STATE OF RHODE ISLAND

DIVISION OF FIRE SAFETY

COMPLAINT # 2-2542

1. COMPLAINANT: LIEUTENANT EDMOND H. FARRELL
PAWTUCKET FIRE DEPARTMENT

2. OWNER (S)

COUTU, GERALD W. & MILDRED R.
5 MEADOW AVENUE
JOHNSTON, RHODE ISLAND

3. OCCUPANT (S)

OCCUPIED COMMERCIAL AND
MULTI-FAMILY BUILDING
502-504 PAWTUCKET AVENUE
PAWTUCKET, RHODE ISLAND

4. Type of Investigation	5. Location of Loss	6. Day and Date
Fire - Occupied Commercial and Residential Bldg.	502-504 Pawtucket Avenue Pawtucket, Rhode Island	Saturday, June 7, 1986 @ 11:34 P.M.

7. Narrative of Investigation:

Fire determined to be of incendiary origin caused extensive damage to this three-story brick commercial/residential building with basement, located in a densely populated residential neighborhood of moderately priced homes. The building is occupied by two stores and nine apartments.

Scene examination conducted by Investigator DONALD M. BYRNE and Lieut. FARRELL reflected fire originated in the basement, at the front stairway leading to the first floor. Fire extended from this area vertically and horizontally to the partitions of the first floor which housed a Beauty Salon and Laundromat. Both businesses received heavy damage; the remainder of the building received heavy smoke and water damage. No electric wires in immediate area of point of origin and no connection between point or area of origin and hot water heater or furnace in basement. All accidental causes eliminated.

Photographs taken by PAWTUCKET POLICE DEPARTMENT. Evidence seized and submitted for analysis to U.R.I. LABORATORIES.

Subject arrested and charged with ARSON 1st DEGREE. Case awaiting court action.

Insurance: CONROY & DALEY AGENCY, Providence, RI; CAMBRIDGE MUTUAL.

8. Origin	9. Status	10. Investigator	11. Date of Report
INCENDIARY	PENDING (Arrest Made)	GERALD A. LEDDY	JUNE 18, 1986

EXHIBIT E

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

STATE OF RHODE ISLAND	:	
	:	
VS	:	P1/86-2703
	:	
THOMAS BOWLING	:	

DEFENDANT'S ANSWER TO STATE'S REQUEST FOR DISCOVERY

1. Street map, City of Providence.

2. Keeper of Records, Pawtucket Fire Department and/or investigator Gerald A. Leddy (see State's answer to discovery) that a dumpster fire was reported at 502-504 Pawtucket Avenue at 10:36 p.m. June 7, 1986; that the building fire was reported at 11:34 p.m.

3. Jennette Fagundes, 965 Chalkstone Avenue, Providence, RI, that she is the sister of Doris Palmieri, that she has known the defendant to have lived with her sister for many years and often visited them at their apartment on Pawtucket Avenue; that on the evening of June 7, 1986 she and her sister were at the Lithuanian Club on Smith Street, Providence, RI along with her roommate Loretta Brady (now deceased); that sometime after 10:00 p.m. that evening her sister called the defendant to come pick her up; that the defendant came to the Lithuanian Club and picked up herself, her sister and her roommate, drove to her house at 965 Chalkstone Avenue, dropped off Loretta and herself and then left for home (Pawtucket Avenue) with Doris; that she visited Doris after the fire and saw the condition of the apartment; that Doris died near the end of June, 1986 that she saw improvements the defendant had made in the apartment.

4. Angie Miguel, 269 Sayles Avenue, Pawtucket, RI, that when she left her apartment June 7, 1986 early in the evening her husband Thomas and her daughter Tammy were still there; that she went to Rides Grill, Pawtucket, that later that evening she learned of the fire by a telephone call, that she then went to her apartment building and saw the firefighters and saw her mother, Doris Palmieri sitting with another tenant across the street from the apartment building on the sidewalk.

THOMAS BOWLING
By his Attorney

Dale G. Anderson
Assistant Public Defender

CERTIFICATION

I hereby certify that on September 26, 1988, I delivered a copy of the within Motion to the Department of Attorney General, Providence, Rhode Island.

Dale Ordem